Supreme Court of the United States

OCTOBER TERM, 1968

No. 606

UNITED STATES, PETITIONER

vs.

ROY LEE BARRETT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

[fol. A]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA AMERICUS DIVISION

Criminal No. 1411

ROY LEE BARRETT, JACKIE HAMILTON GAINEY, and CLEVELAND JOHNS, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

CAPTION

APPEARANCES:

Elliott & Davis, Attorneys at law, Suite 506 Persons Building, Macon, Georgia, Attorneys for Appellants.

Mr. Floyd M. Buford, U.S. Attorney, Mr. William A. Davis, Jr., Assistant U.S. Attorney, Post Office Building, Macon, Georgia, Attorneys for Appellee.

APPEAL from the District Court of the United States for the Middle District of Georgia, Americus Division, to the United States Court of Appeals for the Fifth Circuit, returnable at the City of New Orleans, Louisiana.

[fol. 2] INDICTMENT

* * * *

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 25th day of March, 1960 in the Americus Division of the Middle District of Georgia and within the jurisdiction of this Court, ROY LEE BARRETT,

JACKIE HAMILTON GAINEY and CLEVELAND JOHNS, did have in their possession and custody and under their control a still and distilling apparatus for the production of spiritous liquors set up without having the same registered as required by law, in violation of 26 U.S.C.A., Sections 5179(a), 5601(a).

COUNT TWO

And the Grand Jury further charges that at the time and place and within the jurisdiction aforesaid, the said ROY LEE BARRETT, JACKIE HAMILTON GAINEY and CLEVELAND JOHNS carried on the business of a distiller(s) of spiritous liquors without having given bond as required by law, in violation of 26 U.S.C.A., Sections 5173, 5601 (a).

COUNT THREE

And the Grand Jury further charges that at the time and place and within the jurisdiction aforesaid, the said ROY LEE BARRETT, JACKIE HAMILTON GAINEY and CLEVELAND JOHNS engaged in and carried on the business of a distiller(s) of spiritous liquors with intent to defraud the United States of the tax imposed thereon in violation of 26 U.S.C.A. Section 5602.

[fol. 3]

COUNT FOUR

And the Grand Jury further charges at the time and place and within the jurisdiction aforesaid the said ROY LEE BARRETT, JACKIE HAMILTON GAINEY, and CLEVELAND JOHNS worked in a distillery for the production of spiritous liquors upon which no sign was placed and kept, showing the name of the person engaged in distilling and denoting the business in which engaged, in violation of 26 U.S.C.A., Section 5180, 5681(c).

/s/ Floyd M. Buford
United States Attorney

/s/ Geo. W. Hadaway
Foreman of the Grand Jury.

ENDORSEMENTS OF REVERSE

• • • •

At the direction of the Court, we the Jury, find the defendants, Not Guilty, on Count 4. This January 16, 1962.

/s/ Eugene Rault
Foreman

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT of GEORGIA
AMERICUS DIVISION

THE UNITED STATES OF AMERICA

vs.

ROY LEE BARRETT
JACKIE HAMILTON GAINEY
CLEVELAND JOHNS

INDICTMENT

Vio: 26 U.S.C.A. 5179(a), 5601(a), 5173, 5602, 5180, 5681(c).

A True Bill:

/s/ Geo. W. Hadaway
Foreman

[fol. 4] Filed in open court this 15th day of August A.D., 1961

/s/ John P. Cowart
Clerk.

I, Roy Lee Barrett having been advised of my Constitutional rights, and having had the charges herein stated to me, plead Not Guilty In Open Court, this 15th day of January, 1962

/s/ J. Sewell Elliott
Atty. for Defendant

I, Jackie Hamilton Gainey having been advised of my Constitutional rights and having had the charges herein stated to me, plead Not Guilty In Open Court, this 15th day of January 1962.

/s/ J. Sewell Elliott
Atty. for Defendant

I, Cleveland Johns, having been advised of my Constitutional rights, and having had the charges herein stated to me, plead Not Guilty In Open Court, this 15th day of January, 1962.

/s/ J. Sewell Elliott
Atty. for Defendant

IN UNITED STATES DISTRICT COURT

VERDICT—January 16, 1962

We, the jury find the defendant Guilty on Counts 1, 2 & 3 this 16th day of January, 1962.

/s/ Ethridge Paulk
Foreman

[fol. 5]

TRANSCRIPT OF EVIDENCE AND CHARGE OF COURT

• • • •

(Witnesses called, sworn and sequestered.)

W. W. WILLIAMS

being called by the Government testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q Will you state your name?
A William W. Williams.
Q Mr. Williams, what is your occupation?
A I'm an investigator with the Alcohol and Tobacco Tax Division.
Q How long have you been so engaged?
A Five years.
Q Have you ever seen the defendants in this case?
A Can you identify them?
A Yes, sir.
Q You know them by name?
A Yes, sir.
Q Point them out to us.
A That's Cleveland Johns with the bow tie on, Jackie Hamilton Gainey with the checked shirt, and Roy Lee Barrett on the end of the table.
A Have you ever had occasion to investigate these defendants?
A Yes, sir.
Q What crime was it in connection with?
[fol. 6] A It involved an illegal whiskey distillery.
Q Was it about August 15, of 1961?
A I believe it was March 25 of 1960.
Q All right, relate to us then under what circumstances you saw this defendant—these defendants on March 25, 1960?
A On the morning of March 25, 1960 I was at the distillery with officers Charles Huguley, Bobby Oliff, Roy Cook, Harold Pike and Roy Blont. About 4:40 a.m., in the morning, a Dodge truck came to this distillery. Jackie Hamilton Gainey got out of the truck with a flashlight

and Officer Oliff arrested him. I went up to the truck then and Barrett and Johns were in the cab of the truck. They rolled the glasses up and locked the door and put the truck in reverse and tried to back out of the still yard, and we arrested them. We had to break a glass to get into the truck and we arrested both men, and on the truck there was a cylinder of butane gas, a full cylinder.

Q What else did you find?

A Well, at the still there were two 2250 gallon metal tank stills and 4500 gallons of mash, and the still was being fired with butane gas. There 8 cylinders at the still.

Q How long have you known the still was there?

A Well, I had been to this still the day before. This was my second time at the still.

Q What county was it in?

A Macon, County—Dooly County, seven miles west of Unadilla.

Q Was this a moonshine distillery?

A Yes, sir.

[fol. 7] Q Could you tell how long it had been in operation?

A It was a new outfit and never had been operated.

(Recessed 12:30-2:45)

Q Mr. Williams, you testified about the still that you discovered. Let me ask you this: was that still set up for operation?

A Yes sir, it was.

Q How much mash did you find there?

A 4500 gallons.

Q What was the size of these still tanks?

A There were two square still tanks used as fermenters that would hold 2250 gallons each.

Q Approximately how much moonshine liquor would that make?

A That would have made between 450 and 500 gallons.

Q Are these the men that you found at that still?

A Yes, sir.

Q You are sure?

A Yes sir.

MR. JOE DAVIS: If Your Honor please, we object to what this quantity of mash, or whatever it was referred to as, would make. There is no evidence of any possession here, no charge of possession. It's immaterial and irrelevant, pure speculation. There are too many variables involved to let him state that it would make so and so.

THE COURT: You say there is no charge of posses-
[fol. 8] sion? You mean no charge of possession of whiskey?

MR. JOE DAVIS: That's right, sir.

THE COURT: What does the first count charge? Possession of the distillery?

MR. JOE DAVIS: Yes sir.

THE COURT: I overrule the objection.

Q (Mr. Bill Davis) Mr. Williams, did any of these people that you found at that still make a statement to you?

A Yes sir.

Q Did you identify yourself as an Alcohol & Tobacco Tax officer?

A Well, we told them that we were federal officers when we arrested them.

Q You identified yourselves as federal officers?

A Well, I don't know whether we said "federal officers" or not, but two of the defendants knew me from prior meetings.

Q They know that you were a revenue agent?

A Yes sir.

Q Did you advise them of their rights, constitutional rights?

A Yes sir.

Q What kind of statement did they make? What did they tell you?

A Roy Barrett told me that this distillery belonged
[fol. 9] to all of them and that they had set it up a few days before, and he stated that they had come down there the day we arrested them to make the first run.

Q Is that this man at the end of the table here that told you they all owned that still?

A Yes sir, man with the glasses on sitting at the end of the table.

COLLOQUY BETWEEN COURT AND COUNSEL

MR. ELLIOTT: May it please the Court, in the interest of time, and even though there is some confusion in the court room, I would like to move the Court to allow me to read any written statement that this witness may have made with reference to the testimony he has given.

MR. BUDFORD: We have no objection to him seeing the statement that Mr. Williams is referring to.

THE COURT: Very well.

MR. ELLIOTT: And I believe Mr. Davis has a motion.

MR. JOE DAVIS: If Your Honor please, at the conclusion of Mr. Williams' direct testimony, all of these defendants, collectively and individually, *move to exclude* it from any record in this case because it appears conclusively, we submit, that it is substantially the same testimony concerning a transaction or event that was testified to by Mr. Williams in the case of Criminal No. [fol. 10] 7824, Macon Division of this Court, which involved the same three defendants here on trial, among others, and that to permit that testimony to go before this jury would amount to placing each of these defendants in double jeopardy for an offense on which they have already been tried and which has been partially disposed of. I purposely waited until this time to make the motion for the reason that even though, assuming the conspiracy indictment in Macon and the substantive indictment here in the Americus Division are on their face different, it now appears that the evidence of this witness to support the substantive counts here in the Americus Division is substantially the same testimony to which he testified in Macon, Georgia, as to the same still on this same date and as to these three defendants, identically the same transaction, same date, March 25, 1960. Therefore, it is using the evidence again and thereby placing each of these defendants in double jeopardy. I make that motion collectively and individually as to each of the defendants.

Further, as to certain of the defendants, *I move to ex-*

clude it on the basis of collateral estoppel, because even though I do not have in my possession an opinion which has recently been handed down, I am informed that certain rulings have been made by the Fifth Circuit Court of Appeals finding that certain evidence in the Macon case was insufficient as to two of these defendants, and therefore, by virtue of collateral estoppel they can not come in now and use this evidence again because it has been determined that in fact such evidence, or such factual [fol. 11] situations did not exist.

THE COURT: All right, Mr. District Attorney, what do you say to this motion?

MR. BILL DAVIS: May it please the Court, I would like to remind Mr. Davis at this point that there is a difference in a conspiracy and in a substantive crime that we are trying here today. These defendants conspired along with 6 or 8 other bootleggers, as he well knows, conspired, combined and confederated to commit a conspiracy to violate the liquor laws in the Macon division of this court, and that is what they were tried for. We are trying them down here today on a substantive count, a different crime, an independant crime that they committed in this division, this area. (Conferring with the District Attorney)

MR. BUDFORD: What I asked Mr. Davis to call the Court's attention to, Your Honor, the ruling of the Fifth Circuit Court of Appeals dealt entirely with the conspiracy charge. I don't know whether the Court has had an opportunity to read it or not. I just read it this morning and furnished it to Mr. Davis and Mr. Elliot.

The Court made no ruling on the charge that we are not trying. It dealt entirely, as Mr. Davis has pointed out, with the conspiracy charge, and this is a substantive charge here. We say this jury should have this evidence and if the jury and the Court believe it that we are entitled to a conviction.

[fol. 12] THE COURT: Do you have the indictment in the other case and the indictment in this case? Be glad to look at them.

MR. JOE DAVIS: If Your Honor please, I have a printed copy of the record which was filed before the

Court of Appeals. Of course, I am assuming the Court will take judicial notice of the indictment pending in this case in another division but—

MR. BUFORD: We have no objection to the Court looking at the printed record.

MR. JOE DAVIS: I would like to make an additional statement before Your Honor gets through reviewing the indictment. We submit that the only possible theory under which any conviction in this case here could be sustained under the evidence as presented by Mr. Williams, is under some form of agreement or understanding or conspiracy between these individuals who went up to this still, which admittedly they did. Therefore, the facts of this case under which a conviction has to be sustained are similar to the facts of the other case; that is the other case was dependant upon some agreement or understanding and the theory of this prosecution will have to be, we submit, under some theory of understanding or agreement, and therefore by virtue of double jeopary on the one hand or, in the event the circuit Court has held that the other evidence is insufficient, by virtue of collateral estoppel they can't go into it.

[fol. 13] THE COURT: When was the conspiracy indictment returned?

MR. BUFORD: Our recollection is both indictments were returned by the same grand jury on the same date, and the reason these counts were not incorporated in the conspiracy indictment is the venue question, the very question that the Circuit Court was talking about in this recent opinion. Of course, we couldn't charge the substantive offense in the Macon Division on matters that took place in the Americus Division.

MR. JOE DAVIS: The conspiracy indictment was returned in February of 1961, if Your Honor please, because they entered pleas of not guilty on April 17, 1961.

MR. BUFORD: That might be correct. I just don't have the information here.

MR. JOE DAVIS: This indictment was returned, incidentally, after the return of the conspiracy indictment; after the case had been tried, a matter of fact.

THE COURT: When was the conspiracy case tried?

MR. JOE DAVIS: April Term 1961.

THE COURT: And then in August 1961, they were [fol. 14] indicted for the substantive offense?

MR. JOE DAVIS: I believe so, yes sir.

THE COURT: And the conspiracy indictment did not contain but one count and that was a conspiracy count. Is that correct?

MR. DAVIS: Yes sir. One of the overt acts pertains to this date and this activity in Dooly County, Overt Act 7, and the transcript of evidence on page 1 Mr. Williams testified substantially what he just testified to.

MR. BUFORD: But in support of a conspiracy charge, not a substantive charge.

MR. JOE DAVIS: We concede that and we realize it is dependant on the peculair facts of the case. That's why we said on the face of the two indictments they are separate and distinct, but if it develops as a matter of fact that the only theories under which convictions can be sustained are one and the same, that is some agreement or understanding, then it is double jeqpary, or in want of that, collateral estoppel.

COURT: Will someone hand me the decision that you refer to? (Mr. Bill Davis complied.) Anything further?

MR. JOE DAVIS: Only this, Your Honor. In view of that opinion you have just read the evidence in this [fol. 15] case, we submit a conviction in either instance would depend upon some sort of aiding and abetting or some sort of conspiracy or understanding. We say the Fifth Circuit determination of that question is determinative of the issue here, because under the evidence now we submit that any so-called conviction would have to depend upon that in the absence of any testimony that they were seen working there or other evidence to indicate any ownership or possession of it. That's why we say the factual situation here and there, as to particularly Barrett and Gainey, in such instance will have to depend upon some sort of agreement or understanding or aiding and abetting theory and it has been determined adversly to the Government.

THE COURT: Well, as the Court stated in the case which you handed up, "It has long been recognized that

the commission of the substantive offense and a conspiracy are separate and distinct offenses. Thus, with some exceptions, one may be prosecuted for both crimes." I am inclined to think that this particular case does not fall within one of those exceptions, particularly in view of the fact that one of the contentions in the trial of the conspiracy case was that if anything took place it took place in a different division and not in the Macon Division, and the venue did not lie in the Macon Division. So I am boing to *overrule the motion* and let the case proceed.

[fol. 16]

CROSS EXAMINATION

BY MR. ELLIOTT:

Q Mr. Williams, you stated that Mr. Gainey—beg your pardon, Mr. Barrett, I believe, made a statement to you about this distillery?

A Yes sir.

Q Where were the two of you when he made that statement?

A I don't remember exactly. I couldn't say for sure.

Q Well, were you at the still or was it back in the office, or where. Do you know?

A Well, it had to be at the still because, I remember now, after they were arrested I took the truck and the cylinders and the water pump that was at the still and came back to Macon and Mr. Hugueley brought them on to Americus and arraigned them. It was somewhere in the vicinity of the still.

Q On that same night or morning?

A Same morning, yes sir.

Q Was Mr. Johns around when he said that?

A Well, I don't know whether Mr. Johns was standing right there beside him when he said it or not.

Q Well, I'm asking you specifically was that statement made by Barrett in the presence of Johns?

A I don't know whether it was or not.

Q In other words, you cannot testify that it was?

A No sir.

Q How about Mr. Gainey?

A I don't remember that either.

[fol. 17] Q In other words, your testimony is not that Barrett made such a statement in the presence of the other two?

A That's my testimony. I don't know whether he made that statement in the presence of the other two or not.

MR. ELLIOTT: On the basis of that background, Your Honor, I ask for instructions to the jury with reference to any such statement.

THE COURT: Yes sir. Member of the Jury, any statement which one defendant, for instance Mr. Barrett, may have made would not be admissible against the other two defendants. That would be hearsay as to them. It would be admissible only as against the person making it and you should consider it only as against Mr. Barrett, but not as against either of the other two defendants.

Q (Mr. Elliott) All right. Now, we have talked a little bit about this conspiracy trial. Were these three men convicted in Macon in April of last year at this conspiracy trial?

A Yes sir.

Q Did you testify in that case?

A Yes sir.

Q Did you testify about this still?

A Yes sir.

Q Well, Mr. Williams, are you sure Mr. Barrett made a statement to about that still?

A Yes sir, I am.

Q Well, why didn't you testify about that at the trial [fol. 18] last April?

A Well, because I didn't have that statement. I was testifying from a statement that Mr. Ferguson had written for me and that information was in that statement when the conspiracy was tried in Macon.

Q In other words, you all testify according to statements that somebody writes for you and gives to you. Is that what you are saying?

A If the truth is in them, yes sir.

Q Who wrote this one you are testifying according to today?

A I did.

Q How can you be sure?

A Well, because I make my own statements and that statement is one that I made.

Q You didn't do it in April, did you?

A No sir. The date is on the heading of the statement, day it was made, four or five days after the still was seized.

Q All right now. How many cylinders—what was on this truck when it drove in there?

A There was one full 30 gallon butane gas cylinder.

Q You sure it was one?

A Yes sir.

Q You remember that?

A Yes sir.

Q Well, let me refer to the record in this conspiracy case that has already been identified and refresh your memory. I want to ask you a couple of questions with reference to your testimony there. Question: "How many butane gas cylinders were on that truck in Dooly Coun-[fol. 19] ty?" That's the same still we are talking about?

A Yes sir.

Q Answer: "In Dooly County? Q. Yes. A. There was 9 butane gas cylinders seized and I don't remember whether all of them were on the truck or not. Q. How many were on the truck? A. I don't remember how many were on the truck. Q. Didn't you record that in your report? A. I said there was 9 butane gas cylinders sealed and I don't know whether all of the cylinders were on the truck or not. Q. Do you know whether or not any was transported down there in that truck? A. Yes sir. Q. Well, how many? A. I don't know the exact number. There were 9 at the distillery. Q. Well, how many were on the truck? A. Well, I don't know. Q. Is there any way to ascertain how many were on that truck? A. Some of the other officers might know, but I know there were 9 cylinders seized in connection with this distillery and I don't remember how many of these 9 were on the truck."

A That's correct.

Q That what you testified to?

A There was 9 cylinders seized and one was on the truck and 8 was at the still.

Q But that's your testimony back in April?

A Yes sir, that's correct.

Q Well, let me ask you this, and I'm reading again from the transcript, and it says—this is your testimony in answer to a question: "All four men—er—Johns, Gainey and Barrett drove in in a 1955 Dodge Truck—" [fol. 20] And those are the three defendants down here that I named, aren't they?

A Yes sir.

Q "—drove in in a 1955 Dodge Truck to this still we were watching and we arrested all three men when they drove into the still yard and stopped, and the truck was loaded with butane gas cylinders." You recall that testimony?

A I might have, yes sir.

Q Well, if there was just one on there you exaggerated by saying it was loaded, didn't you, Mr. Witness?

A Yes sir, I sure did.

Q And that was in the court room in the other case, wasn't it?

A Yes sir, that was in Macon. It's like I said there, some of the other officers might remember, and I have discussed this case with—

Q Mr. Williams, I'm talking about your testimony.

A Yes sir, that's my testimony.

MR. BUFORD: May it please the Court, I think he has a right to explain his answer, and that's what he's trying to do.

THE COURT: Yes.

A It's like I told you in Macon. Some of the other officers might remember, and I have discussed this case with some of the other officers and I know what was on the truck now.

Q But you weren't very careful about your testimony in Macon when you said those things, were you?

[fol. 21] A Well, I didn't intend to tell any lies and I don't think I did tell any lies.

Q But you were relying on hearsay, with reference to your testimony under oath, weren't you?

A No sir, I was relying on my memory and the statement that I had, and testifying to the best of my ability.

Q Well, you said that you were relying on what the others said, didn't you, and that's the reason you stated that?

A What who said?

Q Is that what you said?

A No sir, I didn't say I was testifying to what somebody else said. I was testifying to what I remembered.

Q But you did testify that that truck was loaded with gas cylinders when he dorve in there, and that was back in April?

A If that's what is in the testimony, I did, yes sir.

Q Now how many of you revenue officers were down there at this still?

A Mr. Hugueley, Oliff, Blount,—

Q Just tell me how many, if you will. I don't think it's necessary to name them all. If you want to I don't mind, but I just want to know how many.

A There was six of us, I believe.

Q How many vehicles did you come there in?

A I'm not sure. I don't even remember. We were not in a vehicle at this still, though.

Q Well, do you remember whether you came in more than one vehicle?

[fol. 22] A No sir, I do not.

Q Which side of the truck did you come up on at the time these men were arrested?

A I came up to the driver's side.

Q Did you know what was going on on the other side?

A Well, I saw investigator Hugueley on the other side trying to get the door open.

Q Are you sure about that, Mr. Williams?

A Yes sir, I'm positive about that.

Q There was a little bit of excitement there, wasn't there?

A Yes sir, they were trying to drive away from the still and had the windows rolled up and the truck was in reverse and just so happened that they had stopped in a wet place and the wheels were spinning.

Q Isn't it true that that car choked, that vehicle was hard to start and choked down.

A The motor was running and the wheels were spinning while we were trying to get the doors open.

Q Well, isn't it true that Mr. Gainey had opened the door on the other side and that door was still wide open and never was closed before the arrest?

A Mr. Gainey got out of the truck when they first stopped in the still yard with a flashlight. They drove to the still, it was still dark and somebody in the truck was shining a flashlight. They came in without headlights. When the truck stopped Mr. Gainey got out of the truck with a flashlight and came down toward the still and that's when we flushed them, and Mr.-er-

[fol. 23] Q You still haven't answered my question.

A Well, I don't know whether the door was closed at that time or not.

Q Just let me ask you my question and if you don't understand it I'll repeat it, but I'm asking you, do you know whether or not that door over on the other side, after Gainey got out, was never closed until after the arrest?

A I know the door was closed when Investigator Hugueley was trying to get it opened.

Q In other words, you say that after Mr. Gainey got out that the door was closed prior to the arrest of the two men in the vehicle?

A Yes sir.

Q Are you sure about that, Mr. Williams?

A Yes sir, I'm sure about that.

Q And you were over on the other side?

A I was on the driver's side, yes sir.

Q And the motor was running and wheels were spinning and you were beating out the glass with your pistol?

A No sir. I was beating out the glass with my flashlight.

Q Do you have a pistol?

A Yes sir.

Q Now this still—you have testified as to how many gallons of mash?

A 4500

Q What does that consist of primarily?
A Primarily water is the main ingredient.
[fol. 24] Q In other words, when you say that many gallons, most of that is just plain water, isn't it?
A No sir, after it ferments it's mash.
Q Well, actually it is primarily made up mostly of water.
A Water and sugar and wheat bran.
Q Mixed together? Now had this still been operated?
A No sir.
Q Had you been to that still before?
A Yes sir.
Q Was there anybody there?
A Not when I was there, no sir.
Q When was that?
A That was the night before the 25th, would have been the night of the 24th.
Q Was it ready to run that night before?
A Yes sir.
Q You feel like it could have been fired up the night before?
A Yes sir.
Q Well, why didn't you stay there and watch it that night then?
A Well, when we—we went out to get some help and we came back in there after midnight on the morning of the 25th.
Q Isn't it true that you all left that still because it wasn't quite ready and came back at a time when you thought it would be ready?
A No sir, that's not true.
Q Had this still ever been operated?
A No sir.
[fol. 25] Q Had any whiskey been made down there at that time?
A No sir.
Q How long have you been an investigator, Mr. Williams?
A Five years.

Q In your experience as a revenue investigator is there anything unusual about certain people owning stills and other people being sent in there to run them?

A No sir.

Q Is there anything unusual about one person setting up a still and then other people being sent down there to operate that still?

A No sir, that's not unusual.

Q In fact it's a very frequent thing, isn't it, that that's the way it's operated?

A Well, yes sir, it's quite frequent.

Q And this still and this truck and these defendants are the very same ones that we talked about as being the Dooly County still in this record on this conspiracy case?

A Yes sir.

Q Now, on the night in question, March 25, 1960, did you see anybody working at that still?

A No sir.

Q Operating that still?

A No sir.

Q Was there anybody down there at that still when you got there?

A On what date?

[fol. 26] Q On the night in question?

A No sir.

Q Was there anybody down there carrying on the business of a distiller?

A No sir, wasn't anybody there when we first got there on the 25th.

Q And these people drove up in a truck, drove up to the vicinity of the still and stopped the truck?

A Yes sir, they drove down a field road through a little wooded area without lights on to this still.

Q I say they drove up to this still?

A Yes sir.

Q And that's what they did?

A Yes sir.

RE-DIRECT

BY MR. BILL DAVIS:

Q Mr. Williams let me show you this copy of your statement and ask you when you wrote that up?

A I wrote that statement March 29, four days after we seized this still.

Q That was how many days after you made the arrest?

A Four days.

Q One other question, you testified there were 9 cylinders seized both on the truck and at the still?

A Yes sir.

Q Was the cylinder which was seized on the truck the same type as the ones that were already at the still? [fol. 27] A Yes sir, it was, 30 gallon butane gas cylinder.

Q Same kind?

A Yes sir.

AMOS BARLOW

being called by the Government, testified as follows:

DIRECT EXAMINATION

BY MR. BILL DAVIS:

Q You are Mr. Amos Barlow?

A Yes sir.

Q Where do you live?

A I live down here in Dooly County, down in Byronville.

Q You know a man named Cleveland Johns?

A No sir, I don't know him. I have seen him though.

Q Do you see him here today?

A Yes sir, that's him sitting right over yonder behind that other man.

Q In the blue suit?

A Yes sir. Ain't it him?

MR. ELLIOTT: May it please the Court, I object to the District Attorney leading the witness. He wants to point out the man he ought not to lead him by saying "in the blue suit".

Q (Mr. Davis) Mr. Witness, come back here and point him out. Let's be sure you know which one is which. Watch your step there. Come on back here and point out the man you know as Cleveland Johns.

A (Leaving the witness stand.) It's that man right there, (pointing) is the one they said was Cleveland Johns.

[fol. 28] Q This man right here?

A Yes sir, that's Cleveland Johns, what they told me his name was.

Q All right, come on back and take the stand now.

A All I know, they told me.

Q Did Cleveland Johns offer to pay you some money?

A Yes sir. He said if I let him come down there and do a little business.

Q What kind of business?

A Didn't say. Just a little business. Amount to $15 a week to me. He didn't say what he was going to do. I didn't even know where it come from. I didn't know nothing about that.

Q Where did he want to do business?

A Sir.

Q Where did he say he wanted to do business?

A Down there on the creek, swamp. He didn't say what he wanted to do. Just said he wanted to go through there and do a little business.

Q Down by the branch?

A Down there in the woods. Just said "down there," and said "if you agree with me to let me go down there and do a little business there it will amount to $15 a week to you." Said, "That will help you buy groceries, won't it?" I said, "Why, yes sir."

Q Was it close to a creek where he said he wanted to do business?

A Right there in the edge of my yard. I didn't know the man. I hadn't never seen him before.

[fol. 29] Q Did he pay you what he offered to?

A Sir?

Q Did he ever pay you what he offered to?

A No sir. He ain't never paid me. If he paid you anything he paid something! He never paid me.

Q He never did pay you?

A Not a penny! Of course he weren't there making no liquor. He weren't there but just a week. I mean it had been a week since he went down there.

Q Well, did you see him going down there?

A No sir. He went in the night.

MR. DAVIS: I move to strike that, Your Honor. He said he didn't see him. It's a rank conclusion.

THE COURT: Yes, I sustain that motion; grant the motion to strike out that he went in the night. That would be pure hearsay. Pay no attention to that, Members of the Jury.

Q (Mr. Bill Davis) What county was this in, Mr. Barlow?

A Dooly County.

Q Do you recall about what date it was?

A No sir, I ain't kept up with nothing like that.

Q Let me refresh your memory. Would it have been along in March of 19—

MR. JOE DAVIS: Object to him leading him, Your Honor.

THE COURT: Mr. District Attorney, don't lead the witness now. Don't lead him any more, because we are [fol. 30] not supposed to lead witnesses.

MR. DAVIS: May it please the Court, I just wanted to refresh his recollection.

THE COURT: I know, but don't lead him. That's what they are objecting to and I am sustaining the objection, and you are going to have to learn to interrogate witnesses without leading them.

Q (Mr. Bill Davis) All right, Mr. Witness, do you have any idea when that date was?

A When the date was?

Q When Mr. Johns came to you to tell you he wanted to do business down by the creek?

A No sir, but it was in March, but I don't know what time it was or nothing about it.

Q You know it was in the month of March?

A Yes sir.

Q Do you have any idea what year?

A Well, it was just about the third year I been messed up in it, I believe. Ain't it about the third year.

Q Being messed up in what?

A In this here, about his going down there. I don't know nothing about what he went for. He just went down there, I knowed that.

Q All right, sir. But you do know it was in March?

A Somewhere along in March.

Q All right.

[fol. 31] CROSS EXAMINATION

BY MR. ELLIOTT:

Q Mr. Barlow, I don't recall, which door did you come in when you came in the court room here?

A I don't know just exactly which door it was. I just come in the door, is all I know.

Q Did you come in this one right here?

A I don't remember what door I come in. I just come in here cause they told me to.

Q But did you walk down a hall and come in the door?

A Yes sir. I was standing down there about the next room over there, and that man come and called "Amos Barlow" and I come.

Q What I want to know is if, before you were sitting there, were you brought up here once this morning?

A Before today?

Q No, to day, but before you came up here to testify.

A Them there folks went down there and got me and brought me up here and it was somewhere along after dinner time. I know I ain't had nothing to eat. I know that.

THE COURT: You haven't had any dinner yet?

A No sir.

Q You say you have not had dinner yet?

A No sir.

Q Well, do you know when everybody else went to dinner?

A No sir.

[fol. 32] Q Where have you been?

A Sir?

Q Where have you been since you have been here?

A Since I been here?

Q Yes sir.

A I just been back there, you know, setting down there in that room like them folks told me to.

Q Have you been down on the floor below here, or up here?

A They brought me on up here, when I come.

Q Well, now, did the officers before, while you were in that room, did anybody bring you out here to that door?

A Bring me?

Q Yeah. Anybody ask you to walk out there?

A Whenever I come in here?

Q No, before you came in here this time?

A Well, I don't know what man it was but he told me I could come on in here and set down in that big hall up there. I was hot out there.

Q What I'm asking you specifically is did somebody bring you to one of those glass windows and ask you to look in here and look at these men sitting here at the table?

A Yes sir.

Q And did they point out to you who Mr. Barlow—who Mr. Johns was?

A No sir. I seen him though.

Q They did bring you up here to look in?

A Yes sir.

[fol. 33] Q And they told you where he was sitting?

A Yes sir.

Q And that was within a half an hour or so before you came in here to testify?

A I don't know how long. I expect it's been an hour or two. I don't know how long it's been.

Q But they brought you up to one of those little windows and had you look in?

A Yes sir.

Q And look at these people sitting in here?

A Yes sir.

Q Was I sitting in here at that time?

A I don't know sir.

Q How many people were sitting at that table at that time?

A I don't know.

Q But they pointed to this table, didn't they?

A Yes sir.

Q And Mr. Barlow, did they charge you with anything up there in Macon with reference to this?

A Put me under two years probation.

Q I say they did make a charge against you?

A No sir. I didn't have nothing to pay nothing with.

Q Yeah, but they prosecuted you, put you under probation?

A I ain't never had nothing. I ain't never been in nothing before and that was just brought on me just uncalled for that way.

Q But they made a charge against you and disposed [fol. 34] of your case, didn't they?

A Put me under two years probation and told me they was through with me, and here I am done back up here, you see.

Q All right, I don't have any further questions.

A That's the way it is.

(Recessed 3:50-4:00)

Q I have one more question, Mr. Barlow. You say they put you on probation?

A Yes sir.

Q How many acres of land did you have down there that the still was located on?

A Thirty six and a half acres.

Q What did they do about that land?

A They sold it. Claim they sold it. They took it out of my hands.

Q You talking about the United States government?

A Somebody did. They sold it to the highest bidder and Richard Garvin bought it.

Q They took your 36 acres from you?

A And claimed $900 against me, and wanted $7,000.

Q In other words they took your land and credited you with $900?

A Took it for $900.

Q And they still want how much money from you?

A $7,750 more.

Q How much money?

A $7,750. Expecting me to pay and I ain't got nothing [fol. 35] to pay nothing with.

Q And that was all because of this still down there?

A That's what they said, yes sir.

Q Did you have anything to do with the still other than what you have told us?

A No sir. The Lord knows I didn't too.

Q No further questions.

A You all ready for me to go home now?

MR. BILL DAVIS: You can come on down now.

MR. ELLIOTT: We have no objections to his being released.

MR. BARLOW: I show hope it's over with too, cause I ain't never been bothered so with nothing in my life.

MR. ELLIOTT: While the next witness is on the way in, Your Honor, I would like to make a motion that any testimony that this witness Barlow gave with reference to Cleveland Johns be excluded as to the other defendants.

THE COURT: What is that now?

MR. ELLIOTT: Mr. Barlow testified with reference to a transaction between himself and Johns which was not in the presence of these other defendants and I would like the jury instructed with reference to any transaction [fol. 36] between one defendant having nothing to do with the other two.

THE COURT: Well, the conversation didn't purport to involve the other two defendants, did it? He said nothing about the other two as I recall.

MR. ELLIOTT: Unless it could be on the basis of a circumstance which is a conspiracy of confederation between the three, Your Honor.

THE COURT: Well, Members of the Jury, I will remind you, if counsel wants me to, that the witness Barlow did not say anything at all, whatsoever, against the other two men, so I don't see how you could say that what he did say would implicate them. He confined his testimony entirely, as I recall it, to Mr. Johns, so you will consider that testimony against Johns, but not against the other two.

R. J. OLLIFF

being called by the Government, testified as follows:

DIRECT EXAMINATION

BY MR. BILL DAVIS:

Q Are you Mr. Bobby J. Olliff?

A Yes sir.

Q What is your occupation?

A Enforcement officer with the State Revenue Department.

Q How long have you been so employed?

A Approximately three years.

Q Mr. Olliff, I'll ask you if you had the occassion to investigate the case that is on trial here today?

[fol. 37] A Yes sir.

Q Tell us under what circumstances you saw them?

A On March 25, 1960 in Dooly County about seven miles West of Unadilla, with officer Williams and officer Hugueley and several other officers we were at this distillery. At about 4:40 a.m. this 1955 Dodge pick-up truck come driving into the distillery yard and Jackie Gainey got out on the right hand side and started around, and then I arrested him and Officer Williams went to the driver's side and arrested Cleveland Johns. He was driving the car and Roy Barrett was in the car and Officer Huegueley went to the other side of the car, truck.

Q These men try to escape?

A Gainey started to running and I arrested him about 15 yards from that point.

Q Did you run him down?

A Yes sir.

Q Can you identify Gainey?

A Yes sir. The boy in the middle there with the red and black shirt on.

Q Can you identify Cleveland Johns?

A Yes sir. He's the one with the bow tie on.

Q Can you identify Roy Lee Barrett?

A He's the one with the glasses on.

CROSS EXAMINATION

BY MR. ELLIOTT:

Q Did you testify that you were on the side of the truck opposite from the driver's side?

[fol. 38] A No sir. I was on the driver's side.

Q On the driver's side?

A Yes sir.

Q Mr. Williams was over on that side too?

A Yes sir, he was with me.

Q Who was over on the other side?

A Officer Hugueley, Officer Pike, Officer Blount and Officer Cook.

Q Four of them over there?

A Yes sir.

Q Who else was over on your-

A They were surrounded on top of the hill there.

Q But now who was on your side?

A Officer Williams.

Q And yourself. Anybody else?

A No sir.

Q How many officers were there all together?

A Officer Williams, Officer Hugueley, Officer Blount, Cook, Pike and myself.

Q Six of you?

A I guess. Every how many that is.

Q But you and Mr. Williams were over on the driver's side and these other people were over on the other side?

A Yes sir.

Q Were you there when he beat the window out?
A I was there when he run up to the side of the car and arrested Mr. Johns. He was under the—
[fol. 39] Q Did you see him break the window?
A No sir, I didn't see him break a window. I was running Mr. Gainey.
Q You were running Gainey?
A Yes sir. He started running when he saw us.
Q How far was Gainey from the car?
A He got out on the right hand side of the truck and walked around it and he saw us and started running.
Q And you started running after him?
A Yes sir.
Q Was the door still open on the other side?
A I don't know.
Q You don't know anything about that?
A No sir.
Q You don't know anything about him beating out the glass?
A No sir.
Q Do you know who sold Mr. Barlow's land?
A Sir?
Q Do you know who sold Mr. Barlow's land?
A Would you mind repeating that?
Q Mr. Barlow, you know who he is?
A Yes sir.
Q He owned that piece of land that this still was on, didn't he?
A I don't know.
Q You don't know?
A No sir.
[fol. 40] Q Well, do you know whether that land has been sold?
A I don't know.
Q By the government?
A I don't know.
Q Don't you know that the U.S. Government has condemned and sold that land?
A No sir, I don't know.
Q That comes under a different department from yours?

MR. BILL DAVIS: Now, may it please the Court, he has already said he doesn't know anything about the land and what happened to it.

MR. ELLIOTT: I'm asking another question now.

Q Do you know the—you are a state agent?

A Yes sir.

Q If it was the State of Georgia that took that land you would know about it, wouldn't you?

A Yes sir, I guess so.

Q So it must have been the federal government that took that land, if it was taken. Is that right?

A I guess. I don't know whether it was taken or not. I don't know.

Q All of this was a federal case from start to finish, wasn't it?

A Yes sir.

Q You were a state agent out there helping the federal men?

A Yes sir, I was assisting in the investigation.

[fol. 41] Q Now you have identified all of these men, haven't you?

A Yes sir.

Q You have seen them many times, haven't you, since that night?

A Yes sir, these three—

Q You saw them in Macon, during the trial there?

A Yes sir.

Q Seen them many times on other occasions?

A Yes sir.

RE-DIRECT

BY MR. BILL DAVIS:

Q Mr. Olliff, did Mr. Roy Lee Barrett make any kind of statement at the time of this arrest?

A Yes sir. He stated that the still belonged to all of them.

Q Just a minute now. Before you answer that let me ask you if he was advised of his rights before making the statement?

A Yes sir.

Q He stated in my presence that the distillery—

MR. JOE DAVIS: Object to that, Your Honor, unless he can show it was outside the presence of the other two defendants and lay the proper foundation with respect to that.

THE COURT: Unless he shows it was outside the presence of the other two?

MR. JOE DAVIS: The circumstances under which this statement was made, if it was by himself off to the side of the still yard I want to make an objection as to [fol. 42] the admissibility of it as to the others and not let it go in and have to technically wipe it out.

THE COURT: Well, Mr. District Attorney, do you mind asking him what Mr. Davis wants you to? That is whether the statement was made in the presence of the other two defendants or not.

MR. BILL DAVIS: Be glad to.

Q Mr. Ollif, was this statement made in the presence of the other two defendants?

A Yes sir.

Q It was?

A Yes sir.

Q They were within hearing range of the statement?

A Yes sir.

Q Would you tell us again what the statement was?

A Barrett stated that the distillery belonged to all of them.

Q This man right over here, Roy Lee Barrett?

A Roy Lee Barrett, the one with the glasses on.

RE-CROSS

BY MR. ELLIOTT:

Q Did you see any of these defendants down there at that still prior to the time that they drove up in that truck?

A No sir.

Q Did you see any of those defendants engaging in the whiskey business or the liquor business on March 25, 1960, the date in charge?

[fol. 43] A You mind repeating that.

Q In other words, you didn't see any of these three defendants around that still prior to the time that they drove up in the truck?

A No sir.

Q Did you see any of them working out there at the still?

A No sir.

Q Did you see any of them engaging in the business of manufacturing whiskey down there at that still?

A No sir.

Q Who advised Mr. Barrett of his rights?

A Investigator Williams.

Q How? What did he tell him?

A I don't recall the exact words he told him.

Q I'm not talking about the exact words. I'm talking about just what you recall he told him.

A I don't recall right off-hand.

Q Well, what do you mean when you advise somebody of their rights? What does that mean?

A That anything they say can be used against them in case they stand trial.

Q And then Mr. Barrett freely and voluntarily gave the statement?

A He said—he stated that the still belonged to all of the men.

Q I'm asking you the circumstances under which he gave you the statement. How many times did Mr. Williams ask him?

[fol. 44] A I don't recall.

Q Did he ask him more than once?

A I don't recall.

Q You don't know anything about that?

A No sir.

MR. JOE DAVIS: May we let the record show we are making the same objection to this witness' testimony that we made with respect to the testimony of Agent Williams?

THE COURT: You mean with reference to the conspiracy charge and so forth?

MR. JOE DAVIS: Yes sir, the motion we made about

the conspiracy charge and substantially the same evidence.

THE COURT: Yes sir, same motion, same ruling.

MR. JOE DAVIS: All right, sir.

MR. BILL DAVIS: The Government rests.

INTRODUCTION OF EVIDENCE BY DEFENDANTS

MR. JOE DAVIS: If Your Honor please, we would like to tender in evidence the record which we handed up to the Court a few minutes ago. We will stipulate that there are literally hundreds of pages, probably, which are not applicable, but at the proper time we would like to strip those out, but—or if the Court would like me to [fol. 45] I can go through the record and read those pages that we want introduced at this time. That is in order to perfect the grounds of the motion that we made heretofore as to the factual evidence adduced at the other trial, and the facts and circumstances adduced at this trial.

THE COURT: Well, it's egreeable with me to let the entire record go in for that purpose and to be culled and reduced to whatever portion counsel may agree upon.

MR. DAVIS: All right, sir.

THE COURT: And if you can't agree then either side can consider that all of it is in or any portion that either side wants. Is that satisfactory?

MR. BILL DAVIS: We have no objections, Your Honor.

THE COURT: Very well.

MR. ELLIOTT: The defense rests, Your Honor.

MR. JOE DAVIS: If Your Honor please, technically, before we rest we have a motion to make at the end of the Government's evidence, and I would like to make it now, nunc pro tunc, as of that moment, and I think it ought to be made outside the presence of the jury.

[fol. 46] THE COURT: All right, let the jury retire.

(Jury retired, 4:25 p.m.)

Motion for Judgment of Acquittal and Ruling Thereon

MR. JOE DAVIS: If Your Honor please, comes now the defendants Roy Lee Barrett and Jackie Hamilton Gainey and Cleveland Johns, individually and collectively, and at the close of the government's evidence make a motion for a judgment of acquittal as to counts 1, 2, 3 and 4 in indictment No. 1411 on the following grounds:

The evidence is wholly insufficient as a matter of law to sustain any conviction on the indictment as drawn. It should not go to the jury. The Government has wholly failed to sustain its burden of proof in overcoming the presumption of innocence that each of these defendants entered upon the trial of this case with, and for that reason the judgment of acquittal should be entered as to each defendant.

Furthermore, we move in an alternative motion, that the indictment be quashed or else a judgment of acquittal be entered as to each of these defendants on the ground that it amounts under the evidence in this case to each defendant having been placed in double jeopardy under the Fifth Amendment of the Constitution of the United States, because it clearly shows that under no theory of this case can a conviction be sustained other than by means of some agreement or understanding between these individuals according to the evidence in this case and that they have already been tried on the conspiracy case involving the same factual situation, and for that reason [fol. 47] the judgment should be granted.

Going one step further as to Jackie Hamilton Gainey and Cleveland Johns—as to Roy Lee Barrett and Jackie Hamilton Gainey, the evidence is absolutely, we say, the same insofar as the evidence in this case is concerned and the evidence in the other case, and that for that reason it amounts to double jeopardy as to them, and for the further reason that under a recent rule of the Fifth Circuit, which I am substantially incorporating in this motion, in the grounds that were urged before that as a matter of collateral estoppel Roy Lee Barrett and Gainey can not be and, indeed, should not be convicted of this case under this evidence since it would have to depend

upon an agreement or understanding, and that is exactly what they were convicted of, that's exactly what the Fifth Circuit, we submit, held to be lacking in the other case.

Furthermore, as a ground of the motion for each and every defendant herein, and with particular respect to Count 4, there is absolutely not one iota of evidence that either one or all of these defendants either worked at or aided in the working at or assisted in the commission of any working offense at any illicit distillery in Dooly County, Georgia.

With respect to Count 3 there is not one iota of evidence in this case that either or all of these defendants engaged in and carried on the business of a distiller of spiritous liquors as alleged in Count 3—Well, that's it. There is just absolutely no evidence, under admissions of the witness from the stand.

Under Count 2 we submit that there is absolutely no [fol. 48] evidence whatsoever, and indeed admissions to the contrary by the witness, that no one of these three defendants carried on the business of a distiller of spiritous liquors in violation of the section set forth in Count 2. There is no evidence of any aiding or abetting in the commission of that crime for which this evidence could go to the jury.

And as to Count 1, if Your Honor please, we say that the Government has wholly failed to show beyond a reasonable doubt that either one or all of these defendants possessed an illicit distillery on the date in question and in the manner alleged in Count 1. Suspicion, yes; abortive attempts to pay a certain sum of money to engage in a particular business that the witness himself said he did not know the nature of; and I submit, if Your Honor please, that it is almost comparable to an automobile carrying people up to the site of an illicit distillery. The automobile, as such, is not engaged in the violation of the law and if it is used merely for the purpose of transporting workers to a still then that automobile can't be forfeited. By the same token these men going up to, and even assuming they went in, the distillery site is insufficient as a matter of law to convict them of the offenses

with which they are charged. I'm not saying what would have happened had the Government waited five or ten minutes before they flushed this still. I'm talking about what happened. It was an instance, we submit, if Your Honor please, that was at most, for the Government, an attempt to commit a crime that was interrupted before it reached its normal objective.

[fol. 49] THE COURT: You have stated your motion?

MR. JOE DAVIS: Yes sir.

THE COURT: What does the Government say to the working count?

MR. BILL DAVIS: We will agree to dismiss the working count.

THE COURT: Very well, I will *grant the motion as to the working count and overrule it as to the others.*

MR. JOE DAVIS: And at this time, in order to get the record perfected as to the sequence of events, Your Honor, we tender into evidence the record that we have heretofore mentiond, and then we rest.

THE COURT: I thought we had already admitted that.

MR. JOE DAVIS: Yes sir, but the record will show that we made a motion for a judgment of acquittal technically after the time that we rested. I want it to show that we made it at the end of the Government's evidence. I don't think it amounts to anything.

THE COURT: But there is no use to introduce the record twice, is there?

MR. JOE DAVIS: No sir, but I just don't want the court to say you failed to—I mean any appellate court to state that you failed to make a motion at the end of the Government's evidence and therefore you waived [fol. 50] your privilige.

MR. TRUETT SMITH: If Your Honor please, we are not going to take advantage of Mr. Davis in this regard, and I want the record to show that.

THE COURT: Very well. I guess the usual ten minutes to the side is sufficient?

MR. ELLIOTT: One other thing, Your Honor, we want these motions to be made at the end of the Govern-

ment's evidence, and those that were overruled we would like to renew after we have rested.

THE COURT: Well, renew anything you want to renew.

MR. ELLIOTT: All right, I would like to renew all of the motions that Mr. Davis made at the end of the Government's evidence, also at the end of our evidence when we rest, those which were overruled by the Court.

THE COURT: Well, I take it the Government has finally rested now, and you have rested. Any additional motions you want to make now?

MR. ELLIOTT: I want to renew all of the motions made by Mr. Davis that the Court overruled.

THE COURT: Very well. I make the same ruling now that I made then.

MR. JOE DAVIS: This record has been identified as *D.1.*

[fol. 51] THE COURT: All right. Proceed with the arguments.

OBJECTION TO ARGUMENT BY GOVERNMENT COUNSEL

MR. BILL DAVIS: The second thing I would like to clear up. The way these counsel have tried to think that you were just enough not on the ball and not capable of clear thinking, to think that they could confuse you and make you think that these people were being held in double jeopardy, being tried for something they didn't do. You know, if you kill a man in Georgia then if you go over in Alabama and kill somebody else—

MR. JOE DAVIS: May it please the Court, there is no evidence of anybody getting killed in Georgia and somebody in Alabama and I object to it.

MR. BILL DAVIS: May it please the court, I just wanted to draw an analogy on the venue question.

THE COURT: Could you use some other illustration, rather than murder?

MR. BILL DAVIS: Yes sir. Well, you know, Gentlemen of the Jury, if you commit a crime in Georgia and you go commit one, say a bank robbery, in another state, you can be tried for both of them.

CHARGE OF THE COURT

(9:30 a.m. Jan. 16, 1962)

Members of the Jury, on yesterday we concluded the [fol. 52] evidence and the argument of counsel in the case of the United States against Roy Lee Barrett and Jackie Hamilton Gainey and Cleveland Johns. They are all in court with their counsel, are they not? Yes. And now it remains only to submit the case to the jury with a brief statement of the law applicable to this case.

I charge you that the indictment which will go to your room with you does not constitute any evidence against the defendants, being only a written statement of the charges which the Government brings against them. Likewise their pleas of not guilty on the cover of the indictment do not constitute evidence in their favor, being simply their written denial of those written charges. The indictment on the one hand, however, and the pleas of not guilty on the other frame and point up to the issues which you are to try in this case and those issues are simply whether or not these defendants did the things that they are charged with doing in these counts of the indictment, and you will frame your verdict and thereby answer these questions for us, of course, solely on the basis of the evidence which you have heard in this court room during the trial. The evidence is to be controlling as to all of these questions of fact.

And, in that connection, I charge you that the evidence consists of what the witnesses said from the witness stand in response to questions propounded by counsel, and it consists also in whatever documentary evidence was introduced and admitted into evidence. It does not consist of or include any statements by counsel during the trial of the case. Statements made by counsel on either side are not evidence.

[fol. 53] Likewise, any statement made by the Court during the trial of the case is not evidence. So it is necessary to distinguish between a lot of colloquy that takes place during the trial of a case and the evidence in the case, and, for instance, arguments of counsel do not constitute evidence. Whatever they say to you, whether it is

the government's counsel or the defendant's counsel, that is not evidence. It serves a useful purpose in helping you analyze and understand and evaluate the evidence, but if counsel make statements which are not borne out by what the witnesses say and what the evidence shows then such statements do not constitute evidence.

Now you are the sole and exclusive judges of the facts in this case. That is your responsibility, to decide whether or not these defendants did the things which they are charged with doing.

To assist you in the performance of your important task the law places upon me the obligation of telling you, and the duty of telling you, what the law is, and it is your duty under your oaths to accept the law as I state it. Sometimes I state it erroneously. If so, I am subject to correction, and I am corrected. There are two courts above me and they don't hesitate to correct me if I am wrong. That is their duty. It is my duty to tell you the law as I see it, and whatever the presiding judge tells you the law is, that's the law, until and unless it is reversed and set aside by some appellate court.

We have no complicated questions of law in this case. I am simply saying that you are the sole and exclusive [fol. 54] judges of the facts in every case, but you take the law as it is stated by the Court in charge to the jury.

The Court will express no opinion in this case as to what the true facts are, because the Court would not want to invade the province of the jury and would want to leave those facts solely to your determination.

You are the sole judges as to the weight of the testimony and as to the credibility of the witnesses who testified before you, and in weighing the testimony and the credibility of the witnesses you may consider a number of factors, including the witness' manner and demeanor on the stand before you, the witness' feelings, his interest, his prejudice or bias, if any, his means of knowing what he testifies about, the probability or improbability of his testimony, the consistency or inconsistency of his statements, his intelligence or lack thereof, the reasonableness or unreasonableness of what he says, and also his personal credibility so far as that may legitimately appear from the trial of the case.

A witness testifies under a solemn oath to tell only the truth and ordinarily a witness is to be presumed to be observing that oath, but this presumption may be overcome by various measures of credibility which the jury will apply in terms of their every day common sense and experience with people and with events.

Now in this case, as in all other criminal cases, we enter upon the trial with the presumption that the defendants are innocent. That presumption, while not evidence in favor of the defendants, is in the nature of evidence on their behalf, being a presumption which casts [fol. 55] upon the United States the burden of proving the charge or charges that it brings against the defendants, and it is the duty and the burden of the Government to prove such charge and such charges beyond a reasonable doubt. But if and when the Government has done that then this presumption of innocence would entirely dissappear from the case, because it is the evidence which is to control on all factual questions.

Now a reasonable doubt is not a whimsical, fanciful or conjectural doubt but it is a doubt founded in reason just as the words plainly imply. Very few propositions can be established beyond any possible doubt and the law does not require such an impossible standard. That standard applicable here is proof beyond a reasonable doubt. You may not convict a defendant upon a guess or a surmise or a suspicion, but you ought not to acquit a defendant on anything less than a reasonable doubt.

Now the indictment in this case is in four counts. The first count charges that these defendants had in their possession, custody and control a still and distilling apparatus for the production of spiritous liquors, set up without having the same registered as required by law. You notice that does not charge the ownership of the distillery. It charges that they had it in their possession and under their custody and control.

Possession may be defined as having personal charge of or exercising the rights of management or control over [fol. 56] the property in question. The Government does not have to prove the legal title to the distilling apparatus. Custody and control are the commonly accepted and generally understood incidents of possession.

Counts two and three charge that these three defendants carried on the business of distillers of spiritous liquors, Count two saying without having given bond as required by law, and Count three saying with intent to defraud the United States of the tax imposed thereon.

I charge you that it is not necessary, in order for the defendants to be guilty under these two counts which charge the carrying on of the business of a distiller, that whiskey actually have been completely manufactured at the distillery. For instance a farmer is in the business of farming during the springtime and before harvest season. Likewise a distiller can legally be in the business of a distiller before he completes the first run. The question is whether or not they were engaging in the business of distillers of spiritous liquors without having given bond as charged in Count 2 and with intent to defraud the United States of the tax imposed thereon as is charged in Count 3.

Count 4 charges that the three defendants worked in a distillery for the production of spiritous liquors. Now that count means legally that they actually worked, themselves, worked down at the distillery. Well, the evidence in this case fails to show that, So I am going to direct you to return a verdict of not guilty as to Count 4 in favor of [fol. 57] each of the three defendants.

In that connection I charge you that we have a statute of the United States which says he is a principal—or not in that connection, but in connection with the other three counts, the first three, I charge you that we have statute which says that he is a principal who directly commits the acts which constitute the offense, and he is also a principal who aids, abets, counsels, procures or induces the commission of the offense. In this jurisdiction they are all principals alike. We make no substantial distinction between principals and aiders and abettors or accessories. They all stand on the same footing. That is all who join in a crime or who aid or abet or counsel its commission or who procure its commission through others are partners in the crime and are, in the eyes of the federal law, equally guilty.

Now the evidence and the arguments in this case took a wide range. I remind you, therefore, that the issue for

you gentlemen, under your oaths, to decide under the evidence in this case is whether or not these three men did what they are charged with doing in Counts 1, 2 and 3 of this indictment.

The issue is not whether the Government should have sold the farm of Amos Barlow. Whether the Government should have sold the farm of Amos Barlow for taxes or not is not the issue in this case, and if you believe, under your oaths as jurors, and under the evidence in this case, that these three men did what they are charged with do-
[fol. 58] ing in Counts 1, 2 and 3 it is your duty to convict them, under your oaths as jurors, whether or not you believe that the Government ought to have sold the farm of Amos Barlow. And, on the other hand, if you do not believe that they are guilty of these three counts or any one of them under the evidence in this case, it is your duty to acquit them whether or not you may think the Government ought to have sold the farm of Amos Barlow.

Now in that connection I charge you that the Congress enacted some statutes many years ago providing that, and looking toward, the forfeiture of property knowingly used by any person in an effort to defraud the Government of taxes. For instance, if I take my car and haul non-tax-paid whiskey in it with an intent to defraud the Government of the taxes, I, therefore, make my car subject to forfeiture.

Likewise, if I knowingly set up a distillery on my few acres of land with intent to use that distillery and that land for the purpose of defrauding the Government of its taxes on the whiskey, then there are certain statutes which contimplate or make possible the forfeiture of that land, and that distillery.

Taxes are imposed by the Congress of the United States upon whiskey and there is an occupational tax imposed upon those who engage in the business of distillers. The occupational tax is a certain named amount. The other tax upon the whiskey is so much per gallon. It is about $9 a gallon on moonshine whiskey, and it is so much per
[fol. 59] gallon according to the alcoholic content of the mash. So the amount of taxes due under the law is graduated according to the size of the operation. The

more mash and whiskey, the more tax is due. The less mash and whiskey, the smaller the tax due.

So the real question in this case is not whether or not Amos Barlow, under his evidence, rented his land to somebody—he mentioned Mr. Johns, I believe—for the purpose of doing some business, a little business, down in the woods by the creek or whatever Amos Barlow's testimony was. You will remember it. The real question is not whether Amos Barlow thereby made his property subject to a federal liquor tax. That is not the main issue in this case, as I have stated.

One other matter. There is a difference between a substantive offense and a conspiracy. A conspiracy is a crime which usually requires a little explanation, and yet, in a way, it is extremely simple. A statute of the United States simply says that if two or more persons agree together that they will violate a law of the United States, and then if either one of them does as much as one overt act in furtherance of that conspiracy then they are all or both guilty of the crime of conspiracy, and that is true whether or not the law which they intended to violate was ever violated or not. The agreement to do it, plus one overt act in furtherance of it constitutes that independant crime. And that crime may be prosecuted only in that [fol. 60] area, that judicial division, in which the agreement was entered into or in which any one of the overt acts was committed.

There is evidence in this case that these three defendants along with several others, were prosecuted up in the Macon Division for the offense of conspiracy, and that as a portion of the evidence in that conspiracy case evidence was admitted as to this Dooly County transaction which you have heard about in this case.

Now that, under the law, is a separate and distinct offense from the substantive offense of carrying on the business of a distiller and of possessing distilling apparatus in Dooly County, Georgia, and under the law a substantive offense as distinguished from a conspiracy is a violation of any statute other than the conspiracy statute, for instance, possessing distilling apparatus as charged in Count 1 and carrying on the business of distillers as charged in Counts 2 and 3.

These defendants could not have been tried in the Macon Division for the substantive offense charged in this indictment because Dooly County is in the Americus Division of the Middle District of Georgia and not in the Macon Division.

So I charge you that the commission of a substantive offense and a conspiracy to commit it are separate and distinct offenses and the mere fact that these three defendants were tried for a conspiracy to violate the liquor laws does not prevent their being tried in this court and [fol. 61] at this time for the specific offense charged against them in this indictment.

So, Members of the Jury, you will go to your room, you will recall the evidence in this case and the charge of the Court, and if you believe that these defendants are guilty you will convict them under your oaths. If you have any reasonable doubt about it then you will acquit them under your oaths.

As I said, let your verdict be not guilty as to Count 4, and then specify what it is with respect to each of the three defendants with respect to the first three counts of the indictment. You may find all three defendants guilty on all charges or you may find all three defendants not guilty on the first three counts, or you may find differently as to the individual defendants. You may find some of them guilty on some of these counts and not guilty on others, and let your verdict specify what your finding is.

There is one other matter which I should mention. I charge you that the presence of defendants at a still, if proved, with or without flight therefrom, or attempted flight therefrom, if proved, would be a circumstance for you to consider along with all the other testimony in the case. Of course, the bare presence at a distillery and flight therefrom of an innocent man is not in and of itself enough to make him guilty. It is possible under the law for an innocent man to be present at a distillery, and it is possible for him to run when about to be apprehended, [fol. 62] and such an innocent man ought never to be convicted, but presence at a distillery, if you think these men were present, is a circumstance to be considered along with all the other circumstances in the case in determining whether they were connected with the distil-

lery or not. Did they have any equipment with them that was necessary at the distillery? What was the hour of day that they were there? Did the officers see them do anything? Did they make any statements?

It is your duty to explore this case, analyze the evidence pro and con fairly. Presence at a still, together with other circumstances in the case, if they are sufficient in your opinion to exclude every reasonable conclusion except that they were there connected with the distillery, in an illegal manner, having possession and custody and control of it and carrying on the business as charged in these two counts, if you believe those things, would authorize you in finding the defendants guilty.

And under a statute enacted by Congress a few years back, when a person is on trial for possession of a non-registered distillery, as in this case, or for carrying on the business of a distiller without giving bond as required by law, as charged in this case, and the defendant is shown to have been at the site of the place at the time when the distilling apparatus is set up without having been registered, or where and at the time when the business of a distiller was engaged in or carried on without bond having been given, under the law such presence of the defendant shall be deemed sufficient evidence to authorize [fol. 63] conviction, unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury.

Now this does not mean that the presence of the defendant at the site and place at the time referred to requires the jury to convict the defendant, if the defendant by the evidence in the case, facts and circumstances proved, fails to explain his presence to the satisfaction of the jury. It simply means that a jury may, if it sees fit, convict upon such evidence, as it shall be deemed in law sufficient to authorize a conviction, but does not require such a result.

You may now retire with the indictment. Do you gentlemen wish this transcript of evidence in the other case to go to the jury room or not?

MR. JOE DAVIS: Yes sir.

THE COURT: Very well; let it go. And you may begin your deliberations. I may say that the Marshal will let you know in just a moment whether I have omitted

anything so as to require additional instructions, and if so he will bring you back. And if I have not omitted anything so as to indicate the necessity of additional instructions he will notify you and you will at that time, and not before, begin your deliberations.

(Jury retired.)

[fol. 64]

EXCEPTIONS TO CHARGE

THE COURT: Are there any exceptions, Gentlemen?

MR. JOE DAVIS: Yes sir, the defendants have some, if Your Honor please.

THE COURT: All right, sir.

MR. JOE DAVIS: If Your Honor please, we except to that portion of your charge as to aiding and abetting because that is the crux of the conspiracy case which was tried before, and there is no evidence whatsoever in this case to authorize a charge on aiding and abetting.

We except to that portion of your charge which refers to the fact that Cleveland Johns may have rented land from Amos Barlow, as we submit there is no evidence whatsoever in this case to authorize that charge.

We except to Your Honor's charge as to the difference between conspiracy and substantive cases, in that the evidence in this particular case does not authorize that charge on such a distinction, granted that such exists, of course, in certain circumstances. We take the position that the conspiracy case in Macon, insofar as the evidence is concerned, is similar to the evidence in this case and that there is no authorization for drawing that distinction between a substantive case and a conspiracy case.

We except to Your Honor's charge with respect to the [fol. 65] hauling of equipment to this still. They are not charged with having in their possession any material intending to use it in the violation of law, or with having in their possession any raw materials as the Internal Revenue statutes, of course, contemplate, and there is no basis for that charge as to equipment, and the fact that it has been injected into this case might, under the circumstances, create an unwarranted circumstance of guilt, we submit.

We except to Your Honor's charge that the presence of the defendant at the site of an illicit distillery is sufficient, unless he gets on the stand and explains why he is there, as being contrary to the constitutional provision that a man enters into the trial of a criminal case with the presumption of innocence in his favor, and it is upon the Government to prove his guilt beyond a reasonable doubt, and not upon the defendant to get upon the stand and explain why he was or was not doing a particular thing.

That's all

THE COURT: All right. We'll let—do you have any exceptions, Mr. Davis?

MR. BILL DAVIS: May it please the Court, the Government has no exceptions to the charge.

THE COURT: Very well, we will let the charge stand.

(Recessed 10:15 a.m., Jan 16, 1962.)

[fol. 66]

[Reporter's Certificate to foregoing transcript omitted in printing.]

IN UNITED STATES DISTRICT COURT

JUDGMENT OF ACQUITTAL AS TO COUNT 4—
January 16, 1962

* * * *

The above stated case having been tried on January 15-16, 1962, and the jury having returned a verdict of not guilty, on Count 4.

IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that the defendants above named are not guilty and that they be forthwith discharged and that the Clerk of this court enter this Judgment of Acquittal accordingly.

This the 16th day of January, 1962.

s/ W. A. Bootle
U. S. Judge

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT OF CLEVELAND JOHNS—
January 16, 1962

* * * *

On this 16th day of January, 1962 came the attorney for the government and the defendant appeared in person [fol. 67] and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of 26 U.S.C.A. 5179(a), 5601(a), 5173, 5602, 5180, 5681(c), Counts 1, 2 & 3-Possessed an unregistered distillery; carried on the business of a distiller, without giving bond and with intent to defraud the United States of tax;

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWO AND ONE-HALF (2½) YEARS, or until he is otherwise discharged as provided by law; service of this sentence shall run concurrently with the sentence in Criminal No. 7824, Macon Division.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that copy serve as the commitment of the defendant.

At Americus, Georgia.

/s/ W. A. Bootle
United States District Judge

[fol. 68]

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT OF JACKIE HAMILTON GAINEY—January 16, 1962

* * * *

On this 16th day of January, 1962 came the attorney for the government and the defendant appeared in person and

by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of 26 U.S.C.A. 5179(a), 5601(a), 5173, 5602, 5180, 5681(c), Counts 1, 2 & 3—Possessed an unregistered distillery; carried on the business of a distiller, without giving bond and with intent to defraud the United States of tax,

as charged,

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

FIFTEEN (15) MONTHS, or until he is otherwise discharged as provided by law.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

[fol. 69] At Americus, Georgia.

/s/ W.A. Bootle
United States District Judge

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT OF ROY LEE BARRETT—
January 16, 1962

* * * *

On this 16th day of January came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of 26 U.S.C.A. 5179(a), 5601(a), 5173, 5602, 5180, 5681(c), Counts 1, 2 & 3—Possessed an unregistered distillery; carried on the business of a distiller, without giving bond and with intent to defraud United States of tax,

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

ONE YEAR AND ONE DAY, or until he is otherwise discharged as provided by law.

[fol. 70] IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

At Americus, Georgia.

/s/ W.A. Bootle
United States District Judge

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—filed January 16, 1962

* * * *

Notice is hereby given that Roy Lee Barrett, R.F.D., Hawkinsville, Georgia, Jackie Hamilton Gainey, Moniac, Georgia, and Cleveland Johns, R.F.D. Hawkinsville, Georgia, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the judgment entered on January 16, 1962, committing named appellants to the custody of the Attorney General for the herein named periods of time on a four count indictment charging a violation of above cited statutes, to-wit:

Roy Lee Barrett—1 year and 1 day.
Jackie Hamilton Gainey—15 months.
Cleveland Johns—2½ years.

THIS 16th DAY of January, 1962.

ELLIOTT & DAVIS

/s/ By. Joseph H. Davis
Attorneys for the within named appellants.

Address:

Suite 506 Persons Building
Macon, Georgia

[fol. 71]

IN UNITED STATES DISTRICT COURT

MOTION FOR ADMISSION OF DEFENDANTS TO BAIL PENDING APPEAL—filed January 16, 1962

* * * *

The defendants, Roy Lee Barrett, Jackie Hamilton Gainey, and Cleveland Johns, move the Court to allow them to be at liberty on bail pending an appeal to the United States Court of Appeals for the Fifth Circuit, and in that connection show the Court the following facts:

The jury returned a verdict of guilty as to movants on the 16th day of January, 1962, and on the 16th day of January, 1962, judgment and sentence was entered as follows:

1. Roy Lee Barrett—1 year and 1 day.
   Jackie Hamilton Gainey—15 months.
   Cleveland Johns—Two and one-half years.

2. On January 16th, 1962, movants filed their notice of appeal from said judgment of conviction.

3. Movants verily believe that they have meritorious grounds for said appeal to the United States Court of Appeals for the Fifth Circuit and further represent that said appeal is not prosecuted by them for delay.

WHEREFORE, movant prays that this Court allow them bail pending the appeal of this case to the United States Court of Appeals for the Fifth Circuit.

ELLIOTT & DAVIS

/s/ By. Joseph H. Davis
Attorneys for defendants

Address:

Suite 506 Persons Building
Macon, Georgia

[fol. 72]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING BAIL PENDING APPEAL— January 16, 1962

* * * *

The within and foregoing motion having been read and considered, it is,

ORDERED AND ADJUDGED that upon movants giving bond in the following sums, to-wit:

Roy Lee Barrett	$2,000.00
Jackie Hamilton Gainey	$2,000.00
Cleveland Johns	$2,000.00

with good and sufficient security to be approved by the Clerk of this Court, said judgments of conviction shall be superseded pending the final determination of the said appeal and that said named defendants shall remain at liberty pending the appeal of their case as aforesaid upon the furnishing of said bonds.

THIS 16th DAY of January, 1962.

/s/ W. A. Bootle
United States District Judge

ACKNOWLEDGEMENT OF SERVICE

[Omitted in printing]

ORDER FOR CLERK TO TRANSMIT EXHIBITS TO USCA 5—March 1, 1962 [Omitted in printing]

[fol. 73]

DESIGNATION OF RECORD ON APPEAL

[Omitted in printing]

[fol. 74]

ORDER TO EXTEND TIME FOR PERFECTING AND DOCKETING RECORD ON APPEAL—filed March 7, 1962 [Omitted in printing]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 75]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19574

ROY LEE BARRETT, JACKIE HAMILTON GAINEY and CLEVELAND JOHNS

versus

UNITED STATES OF AMERICA

MINUTE ENTRY OF ARGUMENT AND SUBMISSION.—October 15, 1962

On this day this cause was called, and submitted on the record and briefs on behalf of appellants and after argument by William A. Davis, Jr., Esq., Assistant U. S. Attorney, for appellee, was submitted to the Court.

* * * *

[fol. 76]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19574

ROY LEE BARRETT, JACKIE HAMILTON GAINEY and CLEVELAND JOHNS, APPELLANTS

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Middle District of Georgia.

OPINION—September 5, 1963.

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge, and JOHNSON, District Judge.

WISDOM, Circuit Judge: The defendants-appellants raise an important issue—the constitutionality of the statutory presumptions which Section 5601(b), Title 26 U.S.C.A. establishes. These are presumptions of a defendant's possession of a still and of carrying on the business of a distiller on a showing of the defendant's unexplained presence at the site of an unregistered still. [fol. 77] Reluctantly, because of a proper respect for Acts of Congress and because of the special competency of the legislature generally to establish rules of evidence and procedure,[1] we feel compelled to hold that these presump-

[1] A rule of presumption is simply a rule changing one of the burdens of proof, *i.e.* declaring that the main fact will be inferred or assumed from some other fact until evidence to the contrary is introduced. There is not the least doubt, on principle, that the Legislature has entire control over such rules, as it has (when

tions violate the due process clause of the Fifth Amendment.

About a quarter to five on the morning of March 25, 1960, Roy Barrett, Jackie Gainey, and Cleveland Johns, the defendants, drove up in a truck to an unregistered still. Gainey got out and, seeing several officers, started to run. The officers outran him and arrested him. Barrett and Johns rolled up the windows of the cab, locked the doors, and tried to back the truck out of the yard. One of the officers broke a window with his flashlight and arrested the two men. The truck carried a full cylinder of butane gas similar to eight other cylinders found at the site of the still. The still, composed of two 2250-gallon tanks, was capable of producing between 450 and 500 gallons of whiskey. At the trial the officers testified that Barrett, shortly after his arrest, said that the still belonged to all three men. They had gone to the still "to make the first run."

[fol. 78] The defendants were convicted on three of four counts of violating the Internal Revenue Code provisions relating to illegal distilling. The first two counts charge the defendants with possessing an unregistered still and with carrying on the business of a distiller without having given the bond required by law. 26 U.S.C.A. 5601(a)(1) and (4). Count Three charges them with carrying on the business of a distiller with intent to defraud the United States of the taxes imposed upon liquor. 26 U.S.C.A. 5602. Count Four charges the defendants with "work[ing] in a distillery for the production of spiritous liquors upon which no sign was placed and kept, showing the name of the person engaged in the distilling and denoting the business." The trial judge directed a verdict of not guilty on this last count. The district court sentenced Barrett to one year and one day, Gainey to

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not infringing the Judiciary's prerogative) over all other rules of procedure in general and evidence in particular—subject only to the limitations of the rules of Evidence expressly enshrined in the Constitution. If the Legislature can abolish the rules of disqualification of witnesses and grant the rule of discovery from an opponent, it can shift the burden of producing evidence. 4 Wigmore on Evidence § 1356 (3d Ed. 1940).

fifteen months, and Johns to two and one-half years in the custody of the Attorney General.

I.

Section 5601 provides in part:

(a) Offenses.—Any person who—

(1) Unregistered stills.—has *in his possession* or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a); or

* * * *

(4) Failure or refusal of distiller or rectifier to give bond.—*carries on the business of a distiller* or rectifier without having given bond as required by law;

[fol. 79]

* * * *

(b) Presumptions.—

(1) Unregistered Stills.—Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, *such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury* (or the court when tried without jury).

(2) Failure or refusal of distiller or rectifier to give bond.—Whenever on trial for violation of subsection (a)(4) the defendant is shown to *have been* at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, *such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury* (or of the court when tried without jury).

These presumptions were added to the Internal Revenue Code by the Excise Technical Changes Act of 1958, 72 Stat. 1398. According to the report of the Senate Finance Committee recommending the changes, the purpose of [fol. 80] these provisions was to overcome the effect of *Bozza* v. *United States*, 1947, 330 U.S. 160 S.Ct. 645, 91 L.Ed. 818:

> "Their purpose is to create a rebuttable presumption of guilt in the case of a person who is found at illicit distilling or rectifying premises, but who, because of the practical impossibility of proving his actual participation in the illegal activities except by inference drawn from his presence when the illegal acts were committed, cannot be convicted under the ruling of the Supreme Court in Bozza v. United States (330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818).
>
> "The prevention of the illicit production or rectification of alcoholic spirits, and the consequent defrauding of the United States of tax, has long been rendered more difficult by the failure to obtain a conviction of a person discovered at the site of illicit distilling or rectifying premises, but who was not, at the time of such discovery, engaged in doing any specific act.
>
> "In the Bozza case, the Supreme Court took the position that to sustain conviction, the testimony 'must point directly to conduct within the narrow margins which the statute defines.' These new provisions are designed to avoid the effect of that holding as to future violations." S. Rep. No. 2090, 85th Cong., 2d Sess. (1958); 3 U.S. Code Cong. & Adm. News 4395, 4580 (1958).

[fol. 81] The difficulty the Government has in proving illicit distilling is in connecting a defendant with the particular offense with which he is charged. This difficulty results in part from the statute: each step in the process of illicit distilling is narrowly defined as a separate offense. As the Supreme Court pointed out in *Bozza*:

> "The Internal Revenue statutes have broken down the various steps and phases of a continuous illicit

distilling business and made each of them a separate offense. Thus, these statutes have clearly carved out the conduct of making mash as a separate offense, thereby distinguishing it from the other offenses involving other steps and phases of the distilling business. Consequently, testimony to prove this separate offense of making mash must point directly to conduct within the narrow margains which the statute alone defines. One who neither engages in the conduct specifically prohibited, nor aids and abets it, does not violate the section which prohibits it." *Bozza* v. *United States*, 1947, 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818.

There is little doubt of Congress' power in civil cases to establish a rule of law of presumptive evidence that is essentially a regulation of the burden of proof. See Mr. Justice Holmes' opinion in *Casey* v. *United States*, 1928, 276 U.S. 413, 418, 48 S.Ct. 373, 72 L.Ed. 632 and Mr. Justice Cardozo's opinion in *Morrison* v. *California*, 1934, 291 U.S. 82, 90, 54 S.Ct. 281, 78 L.Ed. 664. When, however, the legal effect of the rule is to allow an accused person to be found guilty of a crime solely on the basis [fol. 82] of the presumption, unless he comes forward with evidence to overcome the nonexistence of the presumed fact, the practical effect is to coerce the accused into taking the stand in spite of the Fifth Amendment provision that "No person . . . shall be compelled in any criminal case to be a witness against himself." The presumption gives short shrift to the constitutional privilege. It is all very well to say that the defendant need not take the stand: all he has to do is to come forward with evidence.[2] But should the accused exercise his constitutional privilege of remaining silent, the presumption amounts to decisive, unanswerable comment on his Fifth Amendment right not to testify. Even if an accused should take the stand, the effect of the presumption does not disappear, since the law provides that the presumption is still "sufficient evidence to authorize conviction." A person accused of a crime has more than the right to present evidence in his defense. He has the constitutional right to

[2] See 4 Wigmore on Evidence § 1356, p. 732 (3d Ed. 1940).

sit on his hands. As Justice Peaslee of the New Hampshire Supreme Court ably said:

> It is said that so long as the defendant has preserved to him the right to fully present his defense, and then have the evidence weighed, he has nothing to complain of. But the right to make defense is not the whole right secured to one charged with crime. He has also the right to insist that before he can be found guilty there must be substantial evidence upon every fact essential to the establishment of his guilt, and that this evidence shall be weighed by the jury and found sufficient to prove [fol. 83] the case. It is his right to produce any evidence and to stand solely upon the proposition that the state must prove a case against him.
>
> * * * *
>
> The rule of the Constitution is that the defendant in a criminal case cannot be compelled to go forward.
>
> * * * *
>
> In a criminal prosecution, nonaction of the defendant cannot be substituted for action upon the part of the state, as to any matter required to be established as a part of the state's case. Neither the burden of proof nor the burden of proceeding with any evidence to prove such case can be imposed upon the party charged with crime. *State* v. *Lapointe*, 1924, 81 N.H. 227, 123 Atl. 692, 696.

"[I]t is not within the province of a legislature," Justice Holmes has said, "to declare an individual guilty or presumptively guilty of a crime." *McFarland* v. *American Sugar Refining Co.*, 1916, 241 U.S. 79, 36 S.Ct. 498, 60 L.Ed. 890. The unquestioned policy of the criminal law has placed upon the prosecution the burden of proving beyond a reasonable doubt all facts necessary to the defendant's guilt. The Government starts with both the burden of proof and the burden of persuasion.[3] A statute

[3] Here we are not concerned with exceptions based on affirmative defenses such as insanity and self-defense. These defenses do not negative the factual elements of guilt which the prosecution must prove. See Note, Rebuttable Presumptions 55 Col.L.Rev. 527, 543 (1953).

which shifts either one or both of these burdens to an ac- [fol. 84] cused is difficult to reconcile with our hard-earned heritage of fair trials. If the shift compels an accused to come forward with an exculpatory explanation—or else, before the prosecution has made a substantial showing of probability of guilt, the presumption collides with the most fundamental canon of criminal law—the presumed innocence of the defendant. These considerations compel the courts to scrutinize closely any statutory rebuttable presumption of an ultimate fact essential to the proof of a crime.[4]

This brings us to the magic words, "rational connection," the touchstone by which the Supreme Court tests the validity of a statutory presumption. It is not an easy test to apply: in the nature of things any test would lack concreteness. Such a test is perhaps open to the criticism that rationality of legislation is off-limits to the judiciary. Still, it is the test we must apply. We read it as a test [fol. 85] of *reasonableness* more than of bare *rationality*: to comply with the due process clause, proof of the fact upon which the statutory presumption is based must carry a reasonable inference of the ultimate fact presumed.

The Supreme Court first established this test in *Mobile*,

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[4] There is a large volume of legal writings on rebuttable statutory presumptions. See, for example, Thayer, Preliminary Treatise on the Law of Evidence at the Common Law 313-52 (1898); 4 Wigmore, Evidence § 1356, 2490-93, (3d Ed. 1940); McCormick, Evidence 639-40 (1954); Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, 68 U. of Pa. L.Rev. 307 (1920); Brosman, Statutory Presumptions, 5 Tul.L.Rev. 17, 178 (1930-1931); Keeton, Statutory Presumptions, 10 Tex.L.Rex. 34 (1932); Morgan, Some Observations Concerning Presumptions, 44 Harv.L.Rev. 926 (1931); Morgan, Instructing the Jury Upon Presumptions and Burdens of Proof, 47 Harv.L.Rev. 59 (1933); Hale, Necessity of Logical Inference to Support a Presumption, 17 S.Cal. L.Rev. 48 (1943); Morgan, Tot v. United States: Constitutional Restrictions on Statutory Presumptions, 56 Harv.L.Rev. 1324 (1943); Ray, Presumptions and the Uniform Rules of Evidence, 33 Tex.L.Rev. 588 (1955); Note, Constitutionality of Rebuttable Statutory Presumptions, 55 Col.L.Rev. 527 (1955); Morgan, How to Approach Burdens of Proof and Presumptions, 3 Rocky Mt. L.Rev. 34 (1953); Morgan, 1 Basic Problems of Evidence 30, 33-55 (A.L.I. 1954); Laughlin, In Defense of the Thayer Theory of Presumptions, 52 Mich.L.Rev. 195 (1953).

J. & K.C. R.R. v. *Turnipseed*, 1910, 210 U.S. 35, 43 S.Ct., 136, 55 L.Ed. 78. *Turnipseed* was a civil action, but the test is applied in both civil and criminal cases. See also *Yee Hem* v. *United States*, 1925, 268 U.S. 178, 45 S.Ct. 470, 69 L.Ed. 904; *McFarland* v. *United States*, 1[illegible] 241 U.S. 79, 36 S.Ct. 498, 60 L.Ed. 890; *Minski* v. *United States*, 6 Cir., 1942, 131 F.2d 614, affirmed 319 U.S. 468, 63 S.Ct. 1241, 87 L.Ed. 1519; *Caudillo* v. *United States*, 9 Cir. 1958, 253 F.2d 513, cert. den. 357 U.S. 931; *Manning* v. *United States*, 5 Cir. 1960, 247 F.2d 926; Annotations 51 A.L.R. 1139, 86 A.L.R. 179, 162 A.L.R. 477, 495. In *Tot* v. *United States*, 1943, 319 U.S. 463, 63 S.Ct. 1241, 1243, 87 L.Ed. 1519, the Supreme Court explained what it meant by "rational connection." The Court had before it the Federal Firearms Act, 15 U.S.C.A. § 902(f). Section 2(f) of this Act made it unlawful for a person who is a fugitive from justice or who has been convicted of a crime of violence to receive a firearm shipped or transported in interstate commerce. The Act provided that "the possession of a firearm or ammunition by any person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act." [fol. 86] In holding that Section 2(f) violated the Due Process clause, the Court said:

> "The Government seems to argue that there are two alternative tests of validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of the opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, *if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.* This is not to say that a valid presumption may not be created upon a view of relation broader than that a

> jury might take in a specific case. But where the inference is *so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.*" (Emphasis added.)

Thus, under *Tot*, it is not enough that the fact proved be relevant to the ultimate fact presumed. The fact proved must carry an inference of the fact presumed. Moreover, the inference must not be "strained:" it must be so reasonably related to the fact proved as to tend to establish [fol. 87] the defendant's guilt. For example, 18 U.S.C.A. § 659 makes it a criminal offense to have in one's possession goods knowing them to have been stolen from a carrier in interstate commerce. Under that statute evidence of a defendant's possession of recently stolen goods casts upon the defendant the burden of explaining the possession. There is a "rational connection" between an accused's possession of recently stolen property and the theft of the property. *Yielding* v. *United States*, 5 Cir. 1949, 173 F.2d 46. And see *Wilson* v. *United States*, 1896, 162 U.S. 613, 16 S.Ct. 895, 40 L.Ed. 1090. "[I]n such a case it remains true that the prosecution still has the burden of proving the accused guilty by evidence of facts and inferences fairly drawn from the fact proved." *Government of the Virgin Islands* v. *Torres*, D.C. Virgin Is. 1958, 161 F.Supp. 669. But suppose that all the statute requires the Government to prove is that the accused was in "possession" of an article "which may reasonably be suspected of being stolen." 14 V.I.C. § 2102(b) so provided. In *Torres*, Judge Maris held that the statute was invalid under the Due Process clause: "There is not such a rational connection between the facts proved by the prosecution and the fact which the statute permits to be inferred from those facts."

How do subsections 5601(b)(1) and (2) fare under the "rational connection" criterion? First of all we note that the declared reason for the presumption, according to the Senate Finance Committee Report, is inconvenience of proof. Mere convenience to the Government in proving its case is not a sufficient basis for presumption. This is

[fol. 88] *Tot's* teaching. It is true that an accused knows why he possesses a firearm or is at a still-site, or has better means of information than the Government. In answer to this argument, the Court said in *Tot*:

> The Government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts. 319 U.S. at 469.

Section 5601(b)(1) makes mere presence of a defendant at an unregistered distillery presumptive evidence [fol. 89] that the still is "in his possession or custody, or under his control." A defendant's presence at a still is certainly a relevant fact, but it is not realistic or reasonable to say that such presence carries the inference of *possession* of the still. Possession of a thing such as a still involves the highly technical legal concept of dominion, control. As we pointed out in *McFarland v. United States*, 5 Cir. 1960, 273 F.2d 417, 419, "Possession of a still is not the same as possession of a hat or a ring or a nickel." In that case we approved the definition the district court gave to the jury:

> "Possession of an unlawful still means that the defendant must have some dominion over the property, or some extrinsic circumstance that gives him the right to possess which includes control. It means having, holding or detention of property in one's own power or command. Ownership, whether rightful or wrongful, is not necessary to establish possession. ¶Possession may be defined as having personal charge of, or exercising the rights of management or control over the property in question. Mere presence at the scene of an unlawful distillery with nothing more doesn't constitute possession." 273 F.2d at 419.

This Court has held, time and again, that "mere presence at a still site cannot support a conviction for violation of the liquor laws relative to the still." *Fowler* v. *United States*, 5 Cir. 1956, 234 F.2d 697. Accord, *Vick* v. *United States*, 5 Cir. 1954, 216 F.2d 228; *Cantrell* v. *United States*, 5 Cir. 1946, 158 F.2d 517. See *McFarland* [fol. 90] v. *United States*, 5 Cir. 1960, 273 F.2d 417. The Fourth Circuit, in a case decided after the adoption of the 1958 Amendments to Section 5601, *United States* v. *Freeman*, 4 Cir. 1961, 286 F.2d 262, held that

> "We have found no cases, and none have been sited, where mere presence in the general locality of the still, without some corroborating facts or circumstances to connect the accused with the particular still or the liquor business in general, has been held sufficient to convict one of carrying on the business of a distiller."

This absence of a natural inference of possession of a still from presence at a still distinguishes the presumption here at issue from the statutory presumption this Court upheld in *Manning* v. *United States*, 5 Cir. 1960, 274 F.2d 926. There we were dealing with Section 4744 (a)(1) of the Internal Revenue Code, which stipulates that "proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to

be retained by him shall be presumptive evidence of guilt under this subsection. . . ." In such cases, unlike the case at bar, possession is proved. The statute simply creates a presumption that certain possessions are unlawful. On the other hand, in the instant case only presence near an unregistered still need be proved; the crime itself—possession—is presumed.

Violation of the narcotics laws from possession of marihauna is a natural and compelling inference, for [fol. 91] there is almost no other explanation than guilt consistent with the possession of marihuana. The Ninth Circuit, passing on an almost identical statute in *Caudillo* v. *United States*, 9 Cir. 1958, 253 F.2d 513, cert. den., 357 U.S. 931, 78 S.Ct. 1375, 2 L.Ed. 2d 1373, pointed this out clearly. "The difficulty with appellants' reliance on the Tot case is that it provides no precedent in this, a factually different case. The possession of a firearm or ammunition is ordinarily lawful. There exists the possibility of lawful possession of opium derivatives, or other narcotics, for they have definite therapeutic medical values and a scientific need exists for their possession by many doctors and almost every hospital in the United States. But this Court knows of no medical or scientific use to be made of marihuana, save perhaps for occasional testing, in order to make scientific comparisons with other narcotics, barbiturates, and amphetamines."

Marihuana is not a plant the ordinary citizen cultivates in his garden; almost no inference other than a violation of the narcotics laws can be drawn from possession of marihuana. But there are many inferences other than possession which can be drawn from presence at a still. A defendant might be a hunter who stumbled upon the still, as in *Vick* v. *United States*, 5 Cir. 1954, 216 F.2d 228. He might even be a prospective purchaser of the liquor. He might be present for any one of dozens of other equally probable reasons having nothing to do with possession. Courts should defer to legislative judgment when the legislature, drawing on its broad knowledge of society and [fol. 92] human relationships, decrees, for example, that possession of marihuana, when proved, plus failure to produce an order form, "after reasonable notice and de-

mand," form a proper basis for a rational inference of presumptive guilt. "But when the question is whether reasonable men may differ as to whether a given inference may reasonable be drawn from given data, the answer of a tribunal of last resort may rationally be accepted." Morgan, Note 56 Har.L.Rev. 1324 (1943). And the courts hold, as a matter of law, that reasonable men can not infer possession from the given datum of an accused's presence at a still-site.

Since the presumption established by subsection 5601 (b) (1) falls under the ban of unconstitutionality, subsection (b) (2) must, *a fortiori*, fall; for it makes presence at a still presumptive evidence of carrying on the business of a distiller. Certainly, there is far less ground for the probability of this inference—which, in fact, is a double one, from presence to possession to carrying on a business without bond—than there is for the first one. Neither statutory presumption is grounded upon "the normal balance of probability," *Tot* v. *United States*, 1943, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed 1519.

We hold, therefore, that the trial judge's incorporation of the presumptions into the instruction to the jury operated to deprive the defendants of their constitutional right to due process of law.

[fol. 93] II.

None of the presumptions established by Section 5601 (b) relate to Section 5602, which was the basis of the third count on which the defendants were convicted. In charging the jury, however, the trial judge referred to Counts two and three in almost identical language and made little or no distinction between them. He stated, "Counts two and three charge that these three defendants carried on the business of distillers of spiritous liquors, Count two saying without having given bond as required by law, and Count three saying with intent to defraud the United States of the tax imposed thereon." In the only other reference to Count three he said, "under the law a substantive offense as distinguished from a conspiracy is a violation of any statute other than the conspiracy statute, for instance, possession of distilling ap-

paratus as charged in Count one and carrying on the business of distillers as charged in Counts two and three." We hold that the trial judge erred in not specifically instructing the jury that the presumptions related solely to Counts one and two. In view of the close connection between Counts two and three, which were uniformly treated together by the trial judge, it is unlikely that the jury could have made a distinction between the presumptions and the specific counts to which they related.

III.

The record shows no evidence whatever of intent to defraud. The conviction under Count three cannot therefore be supported.

[fol. 94] IV.

The only question remaining is whether the case should be remanded for a new trial because, aside from the presumptions, there is sufficient evidence to sustain a jury verdict of guilty.

The appellants point out that defendants were never actually working at the still, but were merely in or near the site when arrested. They rely on such cases as *Vick* v. *United States*, 5 Cir. 1954, 216 F.2d 228 and *Fowler* v. *United States*, 5 Cir. 1956, 234 F.2d 697, which we have referred to earlier in this opinion.

We find far more than mere unexplained presence at a still. Defendants drove up to an illicit distillery hidden in a swamp at 4:40 in the morning. They were carrying no rifles, fishing gear, or any other equipment which a hunter or fishermen would have with him. Rather, they were hauling in a Dodge pick-up, not the two cans of gasoline which were in evidence in *Fowler*, but a full tank of butane gas, identical with eight others at the still-site. When they saw the officers, they tried to escape. Moreover, two of the arresting officers testified that Barrett had admitted ownership of the still, and the owner of the property on which the still was located testified that Cleveland Johns had offered to pay him $15.00 a week if he could use the land by the Swamp to

"do a little business." As we said in *McFarland* v. *United States*, 5 Cir. 1960, 273 F.2d 417, 419:

> "There is no doubt that mere presence at a still is not enough in itself to constitute possession of the [fol. 95] still. There is no doubt that flight is not enough in itself to create a presumption of guilt. But presence at a still in the dead of night, flight, knowledge of the location of a well-concealed still, knowledge of the operations (when the mash would be ready for distillation), control over the still (no others were present except in a subordinate capacity), control (Purchase?) of the output, admissions of previous visits to the still, and other evidence pointing to McFarland's relation to the still were enough for the jury to infer that he had control and custody to the extent sufficient to add up to possession."

We hold, therefore, that the record shows sufficient evidence on the first two counts to support a jury finding that the defendants were in possession of the unregistered distillery.

Jurors are practical persons. It is entirely possible that here the jurors assessed the presumptions for what they are worth or entirely ignored them. Because, however, it is impossible to know the extent, if any, to which the jury relied upon the presumptions in returning its verdict, and whether it believed all, part, or none of the evidence other than that establishing the defendants' presence at the still, we have concluded that in the interests of justice the case should be REVERSED and REMANDED for a new trial on Counts One and Two.

[fol. 96]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19,574

D. C. Docket No. 1411 Crim—Americus Div.

ROY LEE BARRETT, JACKIE HAMILTON GAINEY and CLEVELAND JOHNS, APPELLANTS

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Middle District of Georgia.

Before Tuttle, Chief Judge, and Wisdom, Circuit Judge, and Johnson, District Judge.

JUDGMENT—September 5, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial on Counts One and Two.

Issued as Mandate: October 11, 1963

[fol. 97]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 98]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1963

UNITED STATES, PETITIONER

vs.

ROY LEE BARRETT, JACKIE HAMILTON GAINEY and CLEVELAND JOHNS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—October 4, 1963

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Nov. 4th, 1963

/s/ Hugo L. Black

Associate Justice of the Supreme Court of the United States.

Dated this 4th day of October, 1963

INDEX

CITATIONS

715-522—63——1

Statutes—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ———

UNITED STATES OF AMERICA, PETITIONER

v.

ROY LEE BARRETT, JACKIE HAMILTON GAINEY, AND CLEVELAND JOHNS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review those portions of the judgment of the United States Court of Appeals for the Fifth Circuit which reversed respondents' convictions of possessing an unregistered still (count 1) and carrying on the business of a distiller without having given bond (count 2).[1]

OPINION BELOW

The opinion of the court of appeals (App., *infra*, pp. 15–32) is not yet reported.

[1] We do not seek review of the reversal of respondents' convictions of carrying on the business of a distiller with intent to defraud the United States of taxes (count 3).

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1963. On October 4, 1963, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 4, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the statutory presumptions established by Section 5601(b) of the Internal Revenue Code, as here applied, are invalid under the due process clause of the Fifth Amendment.

STATUTE INVOLVED

Section 5601 of the Internal Revenue Code of 1954, as added by 72 Stat. 1398–1399, 26 U.S.C. 5601, provides in pertinent part:

> (a) OFFENSES.
>
> Any person who—
>
> (1) UNREGISTERED STILLS.
>
> Has in his possession or custody or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a); or
>
> * * * * *
>
> (4) FAILURE OR REFUSAL OF DISTILLER OR RECTIFIER TO GIVE BOND.
>
> Carries on the business of a distiller or rectifier without having given bond as required by law; * * *
>
> * * * * *
>
> shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

(b) PRESUMPTIONS.

(1) UNREGISTERED STILLS.

Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

(2) FAILURE OR REFUSAL OF DISTILLER OR RECTIFIER TO GIVE BOND.

Whenever on trial for violation of subsection (a)(4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, respondents were convicted on three counts of a four-count indictment (R. 2–3) [2] charging illegal distilling opera-

[2] The court directed an acquittal on count 4, which charged that the respondents worked in a distillery in which no sign was placed and kept showing the name of the person engaged in the distilling and denoting the business (R. 49, 56–57, 66).

tions in violation of the Internal Revenue Code (R. 66–70). Count one charged them with possession, custody and control of an unregistered still (26 U.S.C. 5601(a)(1)); count two, with carrying on the business of a distiller without having given the bond required by law (26 U.S.C. 5601(a)(4)); and count three, with carrying on the business of a distiller with intent to defraud the United States of the taxes imposed on liquor (26 U.S.C. 5602). Respondents were sentenced generally on the three counts, Barrett to imprisonment for one year and one day, Gainey to imprisonment for 15 months, and Johns to imprisonment for two and one-half years (R. 66–70).

The court of appeals reversed the convictions on all three counts and remanded for a new trial on counts one and two (App., *infra*, p. 33).

The evidence for the government showed that at about 4:40 a.m. on the morning of March 25, 1960, while federal and State revenue agents were maintaining surveillance of an unregistered still in Dooly County, Georgia, respondents drove up to the site. They were in a truck which was being driven with the headlights off. When the truck stopped, respondent Gainey got out carrying a flashlight. He started to run when he saw the officers and was arrested after a short chase. The other respondents rolled up the windows of the truck, locked the door and tried to back out of the area. They were arrested before they could escape (R. 5–6, 22–23, 37–39).

In the truck the officers found a full cylinder of butane gas, which was identical to eight other cylin-

ders found at the site of the still (R. 6, 18, 26–27). The still was being fired with butane gas and consisted of two 2,250 gallon metal tanks capable of producing between 450 and 500 gallons of whiskey (R. 6–7). The officers testified that, shortly after his arrest, respondent Barrett admitted that the still belonged "to all of them" and that they "had set it up" a few days before (R. 8–9, 16, 41–42). The owner of the property on which the still was located testified that respondent Johns had offered him "$15 a week" to use his land to "do a little business" (R. 27–30).

In commenting on the evidence and the consideration the jury should give the "presumptions" provided by 26 U.S.C. 5601(b) (1) and (2), *supra*, p. 3, the trial judge gave the following instructions (R. 61–63):

> There is one other matter which I should mention. I charge you that the presence of defendants at a still, if proved, with or without flight therefrom, or attempted flight therefrom, if proved, would be a circumstance for you to consider along with all the other testimony in the case. Of course, the bare presence at a distillery and flight therefrom of an innocent man is not in and of itself enough to make him guilty. It is possible under the law for an innocent man to be present at a distillery, and it is possible for him to run when about to be apprehended, and such an innocent man ought never to be convicted, but presence at a distillery, if you think these men were present, is a circumstance to be con-

sidered along with all the other circumstances [*sic*] in the case in determining whether they were connected with the distillery or not. Did they have any equipment with them that was necessary at the distillery? What was the hour of day that they were there? Did the officers see them do anything? Did they make any statements?

It is your duty to explore this case, analyze the evidence pro and con fairly. Presence at a still, together with other circumstances in the case, if they are sufficient in your opinion to exclude every reasonable conclusion except that they were there connected with the distillery, in an illegal manner, having possession and custody and control of it and carrying on the business as charged in these two counts, if you believe those things, would authorize you in finding the defendants guilty.

And under a statute enacted by Congress a few years back when a person is on trial for possession of a nonregistered distillery, as in this case, or for carrying on the business of a distiller without giving bond as required by law, as charged in this case, and the defendant is shown to have been at the site of the place at the time when the distilling apparatus is set up without having been registered, or where and at the time when the business of a distiller was engaged in or carried on without bond having been given, under the law such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury.

> Now this does not mean that the presence of the defendant at the site and place at the time referred to requires the jury to convict the defendant, if the defendant by the evidence in the case, facts and circumstances proved, fails to explain his presence to the satisfaction of the jury. It simply means that a jury may, if it sees fit, convict upon such evidence, as it shall be deemed in law sufficient to authorize a conviction, but does not require such a result.

The court of appeals held that the statutory presumptions, as embodied in the instructions of the trial judge, are invalid. The court first stated that the presumption "gives short shrift" to the defendant's constitutional privilege not to take the witness stand, and that its effect is to shift to the defendant the burden of coming forward with an exculpatory explanation, thereby depriving him of the presumption of innocence (App., *infra,* pp. 20–21). Although it concluded that "[t]hese considerations compel the courts to scrutinize closely any statutory rebuttable presumption," (App., *infra,* p. 22), the court appears to have placed its decision on another ground: that Section 5601(b) violates the due process clause of the Fifth Amendment because the fact on which the statutory presumption is based (presence at a still) does not reasonably justify an inference of the ultimate fact presumed (possession of the still, or carrying on the business of a distiller without posting a bond). Such an inference was unwarranted, the court reasoned, because (App., *infra,* p. 28):

> * * * there are many inferences other than possession which can be drawn from presence

> at a still. A defendant might be a hunter who stumbled upon the still * * *. He might even be a prospective purchaser of the liquor. He might be present for any one of dozens of other equally probable reasons having nothing to do with possession. * * *

Reversing the convictions on counts 1 and 2 because of the references to the presumption in the trial court's charge, the court of appeals noted that there was sufficient independent evidence to support a jury verdict of guilty on these two counts and remanded them for a new trial.[3]

REASONS FOR GRANTING THE WRIT

This case involves the constitutionality of the presumptions (or, more accurately, inferences) established by Congress in Section 5601(b) of the Internal Revenue Code. Subsection (1) of that section provides that when a defendant charged with possession, custody or control of an illegal distillery (in violation of Section 5601(a)(1))—

> * * * is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

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[3] As to count 3—which charged respondents with carrying on the business of a distiller with intent to defraud the United States of taxes—the court reversed on the grounds (1) that the trial court's instructions had failed to make clear that the statutory presumptions did not apply to this count and (2) that the evidence did not show any intent to defraud.

Subsection (2) makes similar provision when a defendant is charged with carrying on the business of a distiller without posting a bond (in violation of Section 5601(a)(4)).

These statutory provisions have previously been upheld against constitutional attack by two circuits and applied without question as to constitutionality by a third (see *infra*, p. 10). The Fifth Circuit, however, has struck them down on the ground that due process is violated because of the lack of a "rational connection" between the fact proved (presence at the site of an illegally operated still) and the ultimate fact presumed (possession of the still, or carrying on the business of a distiller without posting bond). The court's conclusion was doubtless influenced by its expressed view that the statutory presumption "gives short shrift" to the constitutional privilege of the defendant not to be a witness against himself (App., *infra*, p. 20). Neither of these constitutional objections, we submit, is well founded. At all events, the question is one which has obvious practical importance from the standpoint of the administration of the revenue laws,[4] and the conflict between the circuits

[4] Section 5601(b) was enacted by Congress in 1958 to obviate difficulties encountered following this Court's decision in *Bozza* v. *United States*, 330 U.S. 160. The Senate Report stated:

"The prevention of the illicit production or rectification of alcoholic spirits, and the consequent defrauding of the United States of tax, has long been rendered more difficult by the failure to obtain a conviction of a person discovered at the site of illicit distilling or rectifying premises, but who was not, at the time of such discovery, engaged in doing any specific act." S. Rep. No. 2090, 85th Cong., 2d Sess., p. 189 (1958).

as to the validity of the act of Congress should be resolved by this Court.

1. In holding that the statutory presumptions here lack the rational basis required by the due process clause, the decision below is squarely in conflict with that of the Sixth Circuit in *United States* v. *Phillips*, 286 F. 2d 428, certiorari denied, 365 U.S. 884. There, precisely the same contention was made by the defendant[5] and necessarily rejected by the court of appeals in a brief *per curiam* opinion (citing cases such as *Yee Hem* v. *United States*, 268 U.S. 178, *Casey* v. *United States*, 276 U.S. 413, and *Caudillo* v. *United States*, 253 F. 2d 513 (C.A. 9), certiorari denied *sub nom. Romero* v. *United States*, 357 U.S. 931, in which presumptions contained in the narcotics laws were upheld against similar challenges). Moreover, the suggestion of the court below that Section 5601(b) operates to shift the burden of proof to the defendant and thereby deprives him of the presumption of innocence is directly contrary to the holding of the Fourth Circuit in *United States* v. *Ivey*, 310 F. 2d 227, certiorari denied, 372 U.S. 929. See, also, *Brown* v. *United States*, 317 F. 2d 521 (C.A. 5), and *Robbins* v. *United States*, 290 F. 2d 281 (C.A. 10), in both of which the Section 5601(b) presumptions were applied without any apparent doubt of their constitutionality.

2. The standard to be applied in determining the constitutionality of a statutory presumption under the due process clause is well established. In the leading case of *Yee Hem, supra*, at 183, this Court, up-

[5] See Petition for Certiorari and Brief in Opposition, No. 712 Misc., 1960 Term.

holding the presumption created by the Narcotic Drugs Import and Export Act of 1909 (now 21 U.S.C. 174) [6]—upon which Section 5601(b) was modeled—reaffirmed the test originally enunciated in *Mobile, J. & K.C. R.R.* v. *Turnipseed,* 219 U.S. 35, 43:

> That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

More recently in *Tot* v. *United States,* 319 U.S. 463, 467–468, the Court held that a statutory presumption cannot be sustained if there is "no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." [7] See, also,

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[6] This statute provides:

"Whenever * * * the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." A like presumption exists with regard to illegal importation of marihuana (see 21 U.S.C. 176(a)).

[7] The actual ruling in *Tot* that the presumption created by the Federal Firearms Act, 52 Stat. 1250, 1251, was irrational is, of course, not controlling here. It is one thing, as in *Tot*, to say that there is no rational connection between the fact of

Casey v. *United States*, 276 U.S. 413, 418; *Hawes* v. *Georgia*, 258 U.S. 1, 4; *Luria* v. *United States*, 231 U.S. 9, 25–26.

The presumptions in issue here satisfy the test of rationality established by these decisions. Illicit distilling operations, by their very nature, are carried on clandestinely in secluded places safe from intrusion by those not privy to the enterprise. Taking that into account and drawing upon its experience in human affairs, Congress was justified in concluding that a person apprehended at the site of an illegally operated distillery, without another obvious explanation, would almost invariably be a participant both in the distilling business and in the possession of the still.[8]

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possession of a firearm by a fugitive or a person previously convicted of a crime of violence and the fact of receipt of the firearm in interstate commerce after the enactment of that statute. It is obvious, on the other hand, that presence at the site of an illegal still is an incriminating fact.

[8] As Professor Morgan has observed (*Tot* v. *United States: Constitutional Restrictions on Statutory Presumptions*, 56 Harv. L. Rev. 1324 (1943)), Congress should have considerable latitude in authorizing inferences of this kind. He states (*id.*, p. 1325):

"* * * Whether one fact forms the basis for a rational inference of another depends upon the relationship between them in human experience. The court is composed of a very limited number of judges, most of them having infrequent contacts with the great mass of the people and having limited means of acquiring information as to pertinent current conditions. The legislature is made up of a large body of men drawn from a large area and having ample opportunity to mingle with people and learn what is happening. The segment of human experience with which they are acquainted is much larger than that with which the members of the court are

3. We also disagree with the court of appeals' suggestion that the statutory presumptions may run afoul of the privilege against self-incrimination. In procedural terms, the effect of the statute is twofold: First, it admonishes the trial and appellate judges that proof of the defendant's presence at the site of an illegal distillery is enough, without more, to prevent a directed verdict of acquittal or a judgment setting aside a conviction for lack of sufficient evidence. Secondly, it authorizes an instruction to the jury such as that given by the trial court here—*i.e.*, that, while the jury is not *required* to draw the statutory inference, it is *free* to do so, provided that, all evidence considered, the jury is convinced beyond a reasonable doubt that the defendant is guilty of the crime charged (see *supra*, pp. 5–7).

What was said in *Yee Hem, supra*, 268 U.S. at 185, therefore applies equally here:

> The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession,

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familiar. Consequently the judgment of the legislature is likely to have much the better basis in knowledge of pertinent facts, and the court should be slow to declare that judgment so unfounded as to be incapable of acceptance by reasonable men; but when the question is whether reasonable men may differ as to whether a given inference may reasonably be drawn from given data, the answer of the tribunal of last resort may rationally be accepted."

that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

4. We deal here with the essential validity of the statute. This is not a case in which the district court gave the statute an extreme meaning or applied it to an abnormal set of facts. On the contrary, the presumption was fairly applied here if ever, and the instructions were as favorable to petitioner as the statute would permit.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

ROBERT S. ERDAHL,
JEROME M. FEIT,
Attorneys.

NOVEMBER 1963.

APPENDIX

In the United States Court of Appeals
for the Fifth Circuit

No. 19574

ROY LEE BARRETT, JACKIE HAMILTON GAINEY AND CLEVELAND JOHNS, APPELLANTS

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Middle District of Georgia

September 5, 1963

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge, and JOHNSON, District Judge

WISDOM, *Circuit Judge:* The defendants-appellants raise an important issue—the constitutionality of the statutory presumptions which Section 5601(b), Title 26 U.S.C.A. establishes. These are presumptions of a defendant's possession of a still and of carrying on the business of a distiller on a showing of the defendant's unexplained presence at the site of an unregistered still. Reluctantly, because of a proper respect for Acts of Congress and because of the special competency of the legislature generally to establish rules of evidence and procedure,[1] we feel

[1] A rule of presumption is simply a rule changing one of the burdens of proof, *i.e.* declaring that the main fact will be in-

711-823—63——3

compelled to hold that these presumptions violate the due process clause of the Fifth Amendment.

About a quarter to five on the morning of March 25, 1960, Roy Barrett, Jackie Gainey, and Cleveland Johns, the defendants, drove up in a truck to an unregistered still. Gainey got out and, seeing several officers, started to run. The officers outran him and arrested him. Barrett and Johns rolled up the windows of the cab, locked the doors, and tried to back the truck out of the yard. One of the officers broke a window with his flashlight and arrested the two men. The truck carried a full cylinder of butane gas similar to eight other cylinders found at the site of the still. The still, composed of two 2250-gallon tanks, was capable of producing between 450 and 500 gallons of whiskey. At the trial the officers testified that Barrett, shortly after his arrest, said that the still belonged to all three men. They had gone to the still "to make the first run."

The defendants were convicted on three of four counts of violating the Internal Revenue Code provisions relating to illegal distilling. The first two counts charge the defendants with possessing an unregistered still and with carrying on the business of

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ferred or assumed from some other fact until evidence to the contrary is introduced. There is not the least doubt, on principle, that the Legislature has entire control over such rules, as it has (when not infringing the Judiciary's prerogative) over all other rules of procedure in general and evidence in particular—subject only to the limitations of the rules of Evidence expressly enshrined in the Constitution. If the Legislature can abolish the rules of disqualification of witnesses and grant the rule of discovery from an opponent, it can shift the burden of producing evidence. 4 Wigmore on Evidence § 1356 (3d Ed. 1940).

a distiller without having given the bond required by law. 26 U.S.C.A. 5601(a) (1) and (4). Count Three charges them with carrying on the business of a distiller with intent to defraud the United States of the taxes imposed upon liquor. 26 U.S.C.A. 5602. Count Four charges the defendants with "work[ing] in a distillery for the production of spiritous liquors upon which no sign was placed and kept, showing the name of the person engaged in the distilling and denoting the business." The trial judge directed a verdict of not guilty on this last count. The district court sentenced Barrett to one year and one day, Gainey to fifteen months, and Johns to two and one-half years in the custody of the Attorney General.

Section 5601 provides in part:

> (a) Offenses.—Any person who—
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> (1) Unregistered stills.—has *in his possession* or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a); or
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> * * * * *
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> (4) Failure or refusel of distiller or rectifier to give bond.—*carries on the business of a distiller* or rectifier without having given bond as required by law;
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> * * * * *
>
> (b) Presumptions.—
>
> (1) Unregistered Stills.—Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus, *such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury* (or the court when tried without jury).

(2) Failure or refusal of distiller or rectifier to give bond.—Whenever on trial for violation of subsection (a)(4) the defendant is shown to *have been* at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, *such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury* (or of the court when tried without jury).

These presumptions were added to the Internal Revenue Code by the Excise Technical Changes Act of 1958, 72 Stat. 1398. According to the report of the Senate Finance Committee recommending the changes, the purpose of these provisions was to overcome the effect of *Bozza* v. *United States,* 1947, 330 U.S. 160 S. Ct. 645, 91 L. Ed. 818:

> Their purpose is to create a rebuttable presumption of guilt in the case of a person who is found at illicit distilling or rectifying premises, but who, because of the practical impossibility of proving his actual participation in the illegal activities except by inference drawn from his presence when the illegal acts were committed, cannot be convicted under the ruling of the Supreme Court in Bozza v. United States (330 U.S. 160, 67 S. Ct. 645, 91 L. Ed. 818).
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> The prevention of the illicit production or rectification of alcoholic spirits, and the consequent defrauding of the United States of tax, has long been rendered more difficult by the failure to obtain a conviction of a person discovered at the site of illicit distilling or rectifying premises, but who was not, at the time of such discovery, engaged in doing any specific act.

> In the Bozza case, the Supreme Court took the position that to sustain conviction, the testimony "must point directly to conduct within the narrow margins which the statute defines." These new provisions are designed to avoid the effect of that holding as to future violations." S. Rep. No. 2090, 85th Cong., 2d Sess. (1958); 3 U.S. Code Cong. & Adm. News 4395, 4580 (1958).

The difficulty the Government has in proving illicit distilling is in connecting a defendant with the particular offense with which he is charged. This difficulty results in part from the statute: each step in the process of illicit distilling is narrowly defined as a separate offense. As the Supreme Court pointed out in *Bozza:*

> The Internal Revenue statutes have broken down the various steps and phases of a continuous illicit distilling business and made each of them a separate offense. Thus, these statutes have clearly carved out the conduct of making mash as a separate offense, thereby distinguishing it from the other offenses involving other steps and phases of the distilling business. Consequently, testimony to prove this separate offense of making mash must point directly to conduct within the narrow margins which the statute alone defines. One who neither engages in the conduct specifically prohibited, nor aids and abets it, does not violate the section which prohibits it." *Bozza* v. *United States,* 1947, 330 U.S. 160, 67 S. Ct. 645, 91 L. Ed. 818.

There is little doubt of Congress' power in civil cases to establish a rule of law of presumptive evidence that is essentially a regulation of the burden of proof. See Mr. Justice Holmes' opinion in *Casey* v. *United States,* 1928, 276 U.S. 413, 418, 48 S. Ct. 373, 72 L. Ed. 632 and Mr. Justice Cardozo's opinion in

Morrison v. *California*, 1934, 291 U.S. 82, 90, 54 S. Ct. 281, 78 L. Ed. 664. When, however, the legal effect of the rule is to allow an accused person to be found guilty of a crime solely on the basis of the presumption, unless he comes forward with evidence to overcome the nonexistence of the presumed fact, the practical effect is to coerce the accused into taking the stand in spite of the Fifth Amendment provision that "No person . . . shall be compelled in any criminal case to be a witness against himself." The presumption gives short shrift to the constitutional privilege. It is all very well to say that the defendant need not take the stand: all he has to do is to come forward with evidence.[2] But should the accused exercise his constitutional privilege of remaining silent, the presumption amounts to decisive, unanswerable comment on his Fifth Amendment right not to testify. Even if an accused should take the stand, the effect of the presumption does not disappear, since the law provides that the presumption is still "sufficient evidence to authorize conviction." A person accused of a crime has more than the right to present evidence in his defense. He has the constitutional right to sit on his hands. As Justice Peaslee of the New Hampshire Supreme Court ably said:

> It is said that so long as the defendant has preserved to him the right to fully present his defense, and then have the evidence weighed, he has nothing to complain of. But the right to make defense is not the whole right secured to one charged with crime. He has also the right to insist that before he can be found guilty there must be substantial evidence upon every fact essential to the establishment of his guilt, and that this evidence shall be weighed by the

[2] See 4 Wigmore on Evidence §1356, p. 732 (3d Ed. 1940).

> jury and found sufficient to prove the case. It is his right to produce any evidence and to stand solely upon the proposition that the state must prove a case against him.
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> * * * * *
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> The rule of the Constitution is that the defendant in a criminal case cannot be compelled to go forward.
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> * * * * *
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> In a criminal prosecution, nonaction of the defendant cannot be substituted for action upon the part of the state, as to any matter required to be established as a part of the state's case. Neither the burden of proof nor the burden of proceeding with any evidence to prove such case can be imposed upon the party charged with crime. *State v. Lapointe,* 1924, 81 N.H. 227, 123 Atl. 692, 696.

"[I]t is not within the province of a legislature," Justice Holmes has said, "to declare an individual guilty or presumptively guilty of a crime." *McFarland* v. *American Sugar Refining Co.,* 1916, 241 U.S. 79, 36 S. Ct. 498, 60 L. Ed. 890. The unquestioned policy of the criminal law has placed upon the prosecution the burden of proving beyond a reasonable doubt all facts necessary to the defendant's guilt. The Government starts with both the burden of proof and the burden of persuasion.[3] A statute which shifts either one or both of these burdens to an accused is difficult to reconcile with our hard-earned heritage of fair trials. If the shift compels an accused to come forward with an exculpatory explanation—or else, be-

[3] Here we are not concerned with exceptions based on affirmative defenses such as insanity and self-defense. These defenses do not negative the factual elements of guilt which the prosecution must prove. See Note, Rebuttable Presumptions 55 Col. L. Rev. 527, 543 (1953).

fore the prosecution has made a substantial showing of probability of guilt, the presumption collides with the most fundamental canon of criminal law—the presumed innocence of the defendant. These considerations compel the courts to scrutinize closely any statutory rebuttal presumption of an ultimate fact essential to the proof of a crime.[4]

This brings us to the magic words, "rational connection," the touchstone by which the Supreme Court tests the validity of a statutory presumption. It is not an easy test to apply: in the nature of things any test would lack concreteness. Such a test is perhaps open to the criticism that rationality of legislation is off-limits to the judiciary. Still, it is the test we must apply. We read it as a test of *reasonableness* more

[4] There is a large volume of legal writings on rebuttable statutory presumptions. See, for example, Thayer, Preliminary Treatise on the Law of Evidence at the Common Law 313–52 (1898); 4 Wigmore, Evidence § 1356, 2490–93, (3d Ed. 1940); McCormick, Evidence 639–40 (1954); Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, 68 U. of Pa. L. Rev. 307 (1920); Brosman, Statutory Presumptions, 5 Tul. L. Rev. 17, 178 (1930–1931); Keeton, Statutory Presumptions, 10 Tex. L. Rev. 34 (1932); Morgan, Some Observations Concerning Presumptions, 44 Harv. L. Rev. 926 (1931); Morgan, Instructing the Jury Upon Presumptions and Burdens of Proof, 47 Harv. L. Rev. 59 (1933); Hale, Necessity of Logical Inference to Support a Presumption, 17 S. Cal. L. Rev. 48 (1943); Morgan, Tot 1. United States: Constitutional Restrictions on Statutory Presumptions, 56 Harv. L. Rev. 1324 (1943); Ray, Presumptions and the Uniform Rules of Evidence, 33 Tex. L. Rev. 588 (1955); Note, Constitutionality of Rebuttable Statutory Presumptions, 55 Col. L. Rev. 527 (1955); Morgan, How to Approach Burdens of Proof and Presumptions, 3 Rocky Mt. L. Rev. 34 (1953); Morgan, 1 Basic Problems of Evidence 30, 33–55 (A.L.I. 1954); Laughlin, In Defense of the Thayer Theory of Presumptions, 52 Mich. L. Rev. 195 (1953).

than of bare *rationality:* to comply with the due process clause, proof of the fact upon which the statutory presumption is based must carry a reasonable inference of the ultimate fact presumed.

The Supreme Court first established this test in *Mobile, J. & K.C. R.R.* v. *Turnipseed,* 1910, 210 U.S. 35, 43 S. Ct., 136, 55 L. Ed. 78. *Turnipseed* was a civil action, but the test is applied in both civil and criminal cases. See also *Yee Hem* v. *United States,* 1925, 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed. 904; *McFarland* v. *United States,* 1916, 241 U.S. 79, 36 S. Ct. 498, 60 L. Ed. 890; *Minski* v. *United States,* 6 Cir., 1942, 131 F. 2d 614, affirmed 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519; *Caudillo* v. *United States,* 9 Cir. 1958, 253 F. 2d 513, cert. den. 357 U.S. 931; *Manning* v. *United States,* 5 Cir. 1960, 247 F. 2d 926; Annotations 51 A.L.R. 1139, 86 A.L.R. 179, 162 A.L.R. 477, 495. In *Tot* v. *United States,* 1943, 319 U.S. 463, 63 S. Ct. 1241, 1243, 87 L. Ed. 1519, the Supreme Court explained what it meant by "rational connection." The Court had before it the Federal Firearms Act, 15 U.S.C.A. § 902(f). Section 2(f) of this Act made it unlawful for a person who is a fugitive from justice or who has been convicted of a crime of violence to receive a firearm shipped or transported in interstate commerce. The Act provided that "the possession of a firearm or ammunition by any person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act." In holding that Section 2(f) violated the Due Process clause, the Court said:

> The Government seems to argue that there are two alternative tests of validity of a presumption created by statute. The first is that there be a rational connection between the facts

> proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of the opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, *if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.* This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is *so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.* [Emphasis added.]

Thus, under *Tot,* it is not enough that the fact proved be relevant to the ultimate fact presumed. The fact proved must carry an inference of the fact presumed. Moreover, the inference must not be "strained:" it must be so reasonably related to the fact proved as to tend to establish the defendant's guilt. For example, 18 U.S.C.A. § 659 makes it a criminal offense to have in one's possession goods knowing them to have been stolen from a carrier in interstate commerce. Under that statute evidence of a defendant's possession of recently stolen goods casts upon the defendant the burden of explaining the possession. There is a "rational connection" between an accused's possession of recently stolen property and the theft of the property. *Yielding* v. *United States,* 5 Cir. 1949, 173 F. 2d 46. And see *Wilson* v. *United States,* 1896, 162 U.S. 613, 16 S. Ct. 895, 40 L. Ed. 1090. "[I]n such a case it remains true that the

prosecution still has the burden of proving the accused guilty by evidence of facts and inferences fairly drawn from the fact proved." *Government of the Virgin Islands* v. *Torres,* D.C. Virgin Is. 1958, 161 F. Supp. 669. But suppose that all the statute requires the Government to prove is that the accused was in "possession" of an article "which may reasonably be suspected of being stolen." 14 V.I.C. § 2102 (b) so provided. In *Torres,* Judge Maris held that the statute was invalid under the Due Process clause; "There is not such a rational connection between the facts proved by the prosecution and the fact which the statute permits to be inferred from those facts."

How do subsections 5601(b) (1) and (2) fare under the "rational connection" criterion? First of all we note that the declared reason for the presumption, according to the Senate Finance Committee Report, is inconvenience of proof. Mere convenience to the Government in proving its case is not a sufficient basis for presumption. This is *Tot's* teaching. It is true that an accused knows why he possesses a firearm or is at a still-site, or has better means of information than the Government. In answer to this argument, the Court said in *Tot:*

> The Government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the infer-

> ence of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts. 319 U.S. at 469.

Section 5601(b)(1) makes mere presence of a defendant at an unregistered distillery presumptive evidence that the still is "in his possession or custody, or under his control." A defendant's presence at a still is certainly a relevant fact, but it is not realistic or reasonable to say that such presence carries the inference of *possession* of the still. Possession of a thing such as a still involves the highly technical legal concept of dominion, control. As we pointed out in *McFarland* v. *United States,* 5 Cir. 1960, 273 F. 2d 417, 419, "Possession of a still is not the same as possession of a hat or a ring or a nickel." In that case we approved the definition the district court gave to the jury:

> Possession of an unlawful still means that the defendant must have some dominion over the property, or some extrinsic circumstance that gives him the right to possess which includes control. It means having, holding or detention of property in one's own power or command. Ownership, whether rightful or wrongful, is not necessary to establish possession. Possession may be defined as having personal charge of, or exercising the rights of management or control over the property in question. Mere presence at the scene of an unlawful distillery with nothing more doesn't constitute possession. 273 F. 2d at 419.

This Court has held, time and again, that "mere presence at a still site cannot support a conviction for violation of the liquor laws relative to the still." *Fowler* v. *United States,* 5 Cir. 1956, 234 F. 2d 697. Accord, *Vic* v. *United States,* 5 Cir. 1954, 216 F. 2d 228; *Cantrell* v. *United States,* 5 Cir. 1946, 158 F. 2d 517. See *McFarland* v. *United States,* 5 Cir. 1960, 273 F. 2d 417. The Fourth Circuit, in a case decided after the adoption of the 1958 Amendments to Section 5601, *United States* v. *Freeman,* 4 Cir. 1961, 286 F. 2d 262, held that:

> We have found no cases, and none have been sited, where mere presence in the general locality of the still, without some corroborating facts or circumstances to connect the accused with the particular still or the liquor business in general, has been held sufficient to convict one of carrying on the business of a distiller.

This absence of a natural inference of possession of a still from presence at a still distinguishes the presumption here at issue from the statutory presumption this Court upheld in *Manning* v. *United States,* 5 Cir. 1960, 274 F. 2d 926. There we were dealing with Section 4744(a)(1) of the Internal Revenue Code, which stipulates that "proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection. * * *" In such cases, unlike the case at bar, possession is proved. The statute simply creates a presumption that certain possessions are unlawful. On the other hand, in the instant case only presence near an unregistered still need be proved; the crime itself—possession—is presumed.

Violation of the narcotics laws from possession of marihuana is a natural and compelling inference, for there is almost no other explanation than guilt consistent with the possession of marihuana. The Ninth Circuit, passing on an almost identical statute in *Caudillo* v. *United States,* 9 Cir. 1958, 253 F. 2d 513, cert. den., 357 U.S. 931, 78 S. Ct. 1375, 2 L. Ed. 2d 1373, pointed this out clearly. "The difficulty with appellants' reliance on the Tot case is that it provides no precedent in this, a factually different case. The possession of a firearm or ammunition is ordinarily lawful. There exists the possibility of lawful possesssion of opium derivatives, or other narcotics, for they have definite therapeutic medical values and a scientific need exists for their possession by many doctors and almost every hospital in the United States. But this Court knows of no medical or scientific use to be made of marihuana, save perhaps for occasional testing, in order to make scientific comparisons with other narcotics, barbiturates, and amphetamines."

Marihuana is not a plant the ordinary citizen cultivates in his garden; almost no inference other than a violation of the narcotics laws can be drawn from possession of marihuana. But there are many inferences other than possession which can be drawn from presence at a still. A defendant might be a hunter who stumbled upon the still, as in *Vick* v. *United States,* 5 Cir. 1954, 216 F. 2d 228. He might even be a prospective purchaser of the liquor. He might be present for any one of dozens of other equally probable reasons having nothing to do with possession. Courts should defer to legislative judgment when the legislature, drawing on its broad knowledge of society and human relationships, decrees, for ex-

ample, that possession of marihuana, when proved, plus failure to produce an order form, "after reasonable notice and demand," form a proper basis for a rational inference of presumptive guilt. "But when the question is whether reasonable men may differ as to whether a given inference may reasonably be drawn from given data, the answer of a tribunal of last resort may rationally be accepted." Morgan, Note, 56 Har. L. Rev. 1324 (1943). And the courts hold, as a matter of law, that reasonable men can not infer possession from the given datum of an accused's presence at a still-site.

Since the presumption established by subsection 5601(b)(1) falls under the ban of unconstitutionality, subsection (b)(2) must, *a fortiori,* fall; for it makes presence at a still presumptive evidence of carrying on the business of a distiller. Certainly, there is far less ground for the probability of this inference—which, in fact, is a double one, from presence to possession to carrying on a business without bond—than there is for the first one. Neither statutory presumption is grounded upon "the normal balance of probability," *Tot* v. *United States,* 1943, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed 1519.

We hold, therefore, that the trial judge's incorporation of the presumptions into the instruction to the jury operated to deprive the defendants of their constitutional right to due process of law.

II.

None of the presumptions established by Section 5601(b) relate to Section 5602, which was the basis of the third count on which the defendants were convicted. In charging the jury, however, the trial judge referred to Counts two and three in almost identical

language and made little or no distinction between them. He stated, "Counts two and three charge that these three defendants carried on the business of distillers of spiritous liquors, Count two saying without having given bond as required by law, and Count three saying with intent to defraud the United States of the tax imposed thereon." In the only other reference to Count three he said, "under the law a substantive offense as distinguished from a conspiracy is a violation of any statute other than the conspiracy statute, for instance, possession of distilling apparatus as charged in Count one and carrying on the business of distillers as charged in Counts two and three." We hold that the trial judge erred in not specifically instructing the jury that the presumptions related solely to Counts one and two. In view of the close connection between Counts two and three, which were uniformly treated together by the trial judge, it is unlikely that the jury could have made a distinction between the presumptions and the specific counts to which they related.

III.

The record shows no evidence whatever of intent to defraud. The conviction under Count three cannot therefore be supported.

IV.

The only question remaining is whether the case should be remanded for a new trial because, aside from the presumptions, there is sufficient evidence to sustain a jury verdict of guilty.

The appellents point out that defendants were never actually working at the still, but were merely in or near the site when arrested. They rely on such cases

as *Vick* v. *United States*, 5 Cir. 1954, 216 F. 2d 228 and *Fowler* v. *United States*, 5 Cir. 1956, 234 F. 2d 697, which we have referred to earlier in this opinion.

We find far more than mere unexplained presence at a still. Defendants drove up to an illicit distillery hidden in a swamp at 4:40 in the morning. They were carrying no rifles, fishing gear, or any other equipment which a hunter or fisherman would have with him. Rather, they were hauling in a Dodge pick-up, not the two cans of gasoline which were in evidence in *Fowler*, but a full tank of butane gas, identical with eight others at the still-site. When they saw the officers, they tried to escape. Moreover, two of the arresting officers testified that Barrett had admitted ownership of the still, and the owner of the property on which the still was located testified that Cleveland Johns had offered to pay him $15.00 a week if he could use the land by the swamp to "do a little business." As we said in *McFarland* v. *United States*, 5 Cir. 1960, 273 F. 2d 417, 419:

> There is no doubt that mere presence at a still is not enough in itself to constitute possession of the still. There is no doubt that flight is not enough in itself to create a presumption of guilt. But presence at a still in the dead of night, flight, knowledge of the location of a well-concealed still, knowledge of the operations (when the mash would be ready for distillation), control over the still (no others were present except in a subordinate capacity), control (purchase?) of the output, admissions of previous visits to the still, and other evidence pointing to McFarland's relation to the still were enough for the jury to infer that he had control and custody to the extent sufficient to add up to possession.

We hold, therefore, that the record shows sufficient evidence on the first two counts to support a jury finding that the defendants were in possession of the unregistered distillery.

Jurors are practical persons. It is entirely possible that here the jurors assessed the presumptions for what they are worth or entirely ignored them. Because, however, it is impossible to know the extent, if any, to which the jury relied upon the presumptions in returning its verdict, and whether it believed all, part, or none of the evidence other than that establishing the defendants' presence at the still, we have concluded that in the interests of justice the case should be REVERSED and REMANDED for a new trial on Counts One and Two.

A true copy.

Test:

EDWARD W. WADSWORTH,
Clerk, U.S. Court of Appeals, Fifth Circuit.

By G. F. GANUCHEAU,
Deputy.

OCTOBER 25, 1963,
New Orleans, Louisiana.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 19574

D.C. DOCKET NO. 1411 CRIM—AMERICUS DIV.

ROY LEE BARRETT, JACKIE HAMILTON GAINEY AND CLEVELAND JOHNS, APPELLANTS

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge, and JOHNSON, District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial on Counts One and Two.

SEPTEMBER 5, 1963.

Issued as Mandate: October 11, 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963

INDEX

CITATIONS

Cases:

742-126—64——1

Cases—Continued

Statutes—Continued

Internal Revenue Code of 1954—Continued

In the Supreme Court of the United States

OCTOBER TERM 1964

No. 13

UNITED STATES OF AMERICA, PETITIONER

v.

ROY LEE BARRETT, JACKIE HAMILTON GAINEY, AND CLEVELAND JOHNS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 55–69) is reported at 322 F. 2d 292.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1963 (R. 70). Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 4, 1963. The petition was filed on that date and granted on January 6, 1964 (R. 72; 375 U.S. 962). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the statutory presumptions established by Section 5601(b) (1) and (2) of the Internal Revenue Code, as here applied, are valid under the Due Process and the Self-Incrimination Clauses of the Fifth Amendment.

STATUTE INVOLVED

The relevant portions of Section 5601 of the Internal Revenue Code of 1954, as amended (26 U.S.C.), 72 Stat. 1275, 1398–1399,[1] read as follows:

> (a) OFFENSES.
>
> Any person who—
>
> (1) UNREGISTERED STILLS.
>
> Has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179 (a); or
>
> * * * * *
>
> (4) FAILURE OR REFUSAL OF DISTILLER OR RECTIFIER TO GIVE BOND.
>
> Carries on the business of a distiller or rectifier without having given bond as required by law; * * *
>
> * * * * *
>
> shall be fined not more than $10,000 or imprisoned not more than 5 years, or both, for each such offense.
>
> (b) PRESUMPTIONS.
>
> (1) UNREGISTERED STILLS.
>
> Whenever on trial for violation of

[1] Related provisions, not directly involved here, are printed in the Appendix, *infra*, pp. 39–41.

subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

(2) FAILURE OR REFUSAL OF DISTILLER OR RECTIFIER TO GIVE BOND.

Whenever on trial for violation of subsection (a)(4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, respondents were convicted on the first three counts of a four count indictment (R. 1-2)[2] charging illegal distilling

[2] The trial court directed an acquittal on Count 4, which charged that the respondents worked in a distillery in which no sign was placed and kept showing the name of the person engaged in the distilling and denoting the business in which he was engaged (R. 2, 36, 41, 47).

operations in violation of the Internal Revenue Code (R. 4, 48–50). Count One charged respondents with possession, custody and control of a set-up, unregistered still and distilling apparatus (26 U.S.C. 5601(a)(1)); Count Two, with carrying on the business of a distiller without having given bond as required by law (26 U.S.C. 5601(a)(4)); and Count Three, with carrying on the business of a distiller with intent to defraud the United States of the taxes imposed on liquor (26 U.S.C. 5602) (R. 1–2). Respondents were sentenced generally on the three counts: Barrett to imprisonment for one year and one day, Gainey to imprisonment for 15 months, and Johns to imprisonment for two and one-half years (R. 48–50).

The evidence adduced by the government showed that, at about 4:40 a.m. on the morning of March 25, 1960, while federal and State revenue agents were maintaining surveillance of an unregistered still in Dooly County, Georgia, respondents drove up to the site in a truck with the headlights off. When the truck stopped, respondent Gainey got out carrying a flashlight. He started to run when he saw the officers and was arrested after a short chase. The other respondents rolled up the windows of the truck, locked the door and tried to back out of the area. They were arrested before they could escape (R. 5–6, 16–17, 19, 27–29).

In the truck the officers found a full cylinder of butane gas, which was the "same type" as eight other cylinders found at the site of the still (R. 6, 20). The still was being fired with butane gas and consisted of two 2,250 gallon metal tanks capable of producing

between 450 and 500 gallons of whiskey; 4500 gallons of mash was also found at the site (R. 6, 17–18). The officers testified that, shortly after his arrest, respondent Barrett admitted that the still belonged "to all of them" and that they "had set it up a few days before" (R. 7–8, 12–13, 30–31). The owner of the property on which the still was located testified that respondent Johns had offered him "$15 a week" to use his land to "do a little business" (R. 21).

In commenting on the evidence and the consideration the jury should give the presumptions provided by 26 U.S.C. 5601(b) (1) and (2), *supra*, pp. 2–3, the trial judge gave the following instructions (R. 44–45):

> There is one other matter which I should mention. I charge you that the presence of defendants at a still, if proved, with or without flight therefrom, or attempted flight therefrom, if proved, would be a circumstance for you to consider along with all the other testimony in the case. Of course, the bare presence at a distillery and flight therefrom of an innocent man is not in and of itself enough to make him guilty. It is possible under the law for an innocent man to be present at a distillery, and it is possible for him to run when about to be apprehended, and such an innocent man ought never to be convicted, but presence at a distillery, if you think these men were present, is a circumstance to be considered along with all the other circumstances in the case in determining whether they were connected with the distillery or not. Did they have any equipment with them that was necessary at the dis-

tillery? What was the hour of day that they were there? Did the officers see them do anything? Did they make any statements?

It is your duty to explore this case, analyze the evidence pro and con fairly. Presence at a still, together with other circumstances in the case, if they are sufficient in your opinion to exclude every reasonable conclusion except that they were there connected with the distillery, in an illegal manner, having possession and custody and control of it and carrying on the business as charged in these two counts, if you believe those things, would authorize you in finding the defendants guilty.

And under a statute enacted by Congress a few years back, when a person is on trial for possession of a non-registered distillery, as in this case, or for carrying on the business of a distiller without giving bond as required by law, as charged in this case, and the defendant is shown to have been at the site of the place at the time when the distilling apparatus is set up without having been registered, or where and at the time when the business of a distiller was engaged in or carried on without bond having been given, under the law such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury.

Now this does not mean that the presence of the defendant at the site and place at the time referred to requires the jury to convict the defendant, if the defendant by the evidence in the case, facts and circumstances proved, fails

> to explain his presence to the satisfaction of the jury. It simply means that a jury may, if it sees fit, convict upon such evidence, as it shall be deemed in law sufficient to authorize a conviction, but does not require such a result.

The court of appeals held that the statutory presumptions, as embodied in the instructions of the trial judge, are invalid. After stating that the provisions give "short shrift" to the defendant's constitutional privilege not to take the witness stand (R. 59–60; 322 F. 2d at 296), the court held that sections 5601(b) (1) and (2) violate the due process clause of the Fifth Amendment because, in its view, the facts on which the presumptions are based (presence at a set-up, unregistered still or presence at the still site at the time when the business of a distiller or rectifier is being engaged in) do not reasonably justify an inference of the ultimate facts presumed (possession of the unregistered still, or carrying on the business of a distiller without posting bond) (R. 67; 322 F. 2d at 300). The court then remanded the case for a new trial on both counts, noting that there was sufficient independent evidence to support a jury verdict on these two counts (R. 68–69; 322 F. 2d at 301).[3]

[3] As to Count 3—which charged respondents with carrying on the business of a distiller with intent to defraud the United States of taxes on distilled spirits—the court reversed on the grounds (1) that the trial court's instructions had failed to make clear that the statutory presumptions did not apply to this count and (2) that the evidence did not show any intent to defraud (R. 67–68; 322 F. 2d at 300).

In our petition for a writ of certiorari, we did not seek review of the reversal on this count.

ARGUMENT

INTRODUCTION AND SUMMARY

At issue here is the constitutional validity of two of five so-called statutory "presumptions" added to the alcohol tax chapter of the Internal Revenue Code when it was revised in 1958.[4] Another of these provisions (together with the first of those in this case) is involved in *United States* v. *Romano*, No. 172, presently pending on the government's petition for a writ of certiorari to the Court of Appeals for the Second Circuit (which held the provisions unconstitutional).[5] We are presently concerned with Sections 5601(b)(1)[6] and 5601(b)(2), which the court below struck down as violating the Due Process Clause of the Fifth Amendment.

The critical difference between the reasoning of the court below and the government's view of this case lies in the definition of the substantive offenses. We agree that if each of the crimes charged covers only the narrow range of conduct supposed by the court

[4] The Excise Technical Changes Act of 1958, 72 Stat. 1275, recodified and somewhat abbreviated a number of disparate provisions involving federal excise taxes, including those in Chapter 51 of the Internal Revenue Code dealing with taxes on alcohol. The several presumptions referred to were enacted as part of that revision.

The two presumptions directly involved in this case, together with the substantive penal provisions to which they refer, are set out as "States Involved," *supra*, pp. 2–3. The other three statutory presumptions, and the related statutes, are printed in the Appendix, *infra*, pp. 39–41.

[5] See *United States* v. *Romano*, 330 F. 2d 566.

[6] Except as otherwise noted, all section references hereinafter are to the Internal Revenue Code of 1954, as amended (26 U.S.C.).

below, then the statutory presumptions may well be unconstitutional because the facts required to be proved may not rationally support the inference that the respondents in fact engaged in such activities. In our view, the crimes of carrying on the business of a distiller without bond (section 5601(a)(4)) and possession of an unregistered still (section 5601(a)(1)) are each broad enough to cover, *either as principal or as accessory*, the activities of any person at all likely to be present at the site of an operable still. In the latter event, the rebuttable presumptions are constitutional under the standards established by this Court and applied by the court below.

Because the government's case is there strongest, we deal first with Count Two—the substantive offense of carrying on the business of a distiller without bond (section 5601(a)(4)) and the accompanying presumption that anyone present at a place where and time when the business is being carried on is engaged in, or is assisting, the operation (section 5601(b)(2)). We preface the argument by recalling the constitutional principle that a rebuttable presumption is valid if the facts giving rise to the presumption can rationally be said to permit finding by inference the additional facts constituting the offense. We then show that the offense of carrying on the business of a distiller without bond is made out, under established precedents, if the prosecution proves that the defendant was in fact present at an illicit "going" still either as employee, or supplier, or purchaser, or in any other capacity connected with the illegal operation. Since no one else is at all likely to be present at such a

clandestine undertaking, drawing an inference of guilt from unexplained presence is entirely reasonable.

We turn next to the offense charged in count one—possession of an unregistered still. The court below held that the limits of that offense today are those established by *Bozza* v. *United States*, 330 U.S. 160, before the enactment of the presumption in 1958. We believe, however, that the obligation to sustain an act of Congress whenever possible, requires giving effect to the congressional intention to overrule *Bozza*—which is evident both in the enactment of the presumption and the accompanying legislative history—by redefining the substantive offense of illegal possession so as to cover all those persons who are on the premises and contributing to the maintenance or operation of the unregistered still. If the substantive offense is that broad, the presumption rests upon an inference which is entirely rational because no one else is likely to be found there.

Each of the respondents was given a general sentence upon all three counts, with less punishment than would be authorized upon any one count. Accordingly, if either count one or count two is sustained, the judgment below must be reversed and that of the district court affirmed. *Claassen* v. *United States*, 142 U.S. 140, 146–147; *Emspak* v. *United States*, 349 U.S. 190, 195, fn. 9.[7]

[7] Because the issue was not presented in our petition for certiorari, being of no general importance, we are in no position to argue that the convictions should be affirmed on count three alone.

I

SECTION 5601(b)(2) IS CONSTITUTIONAL

A. A REBUTTABLE PRESUMPTION IS CONSTITUTIONAL IF THE FACTS GIVING RISE TO THE PRESUMPTION SUPPORT A RATIONAL INFERENCE THAT THE DEFENDANT HAS IN FACT ENGAGED IN THE UNLAWFUL CONDUCT TO BE PROVED.

Section 5601(a)(4) provides that any person who "carries on the business of a distiller" without giving bond shall be guilty of a felony. Section 5601(b)(2) provides that proof that any person was present "at the site or place where, and at the time when," the business of a distiller was carried on without bond, "shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury."

The presumption is rebuttable and, so far as the jury is concerned, merely permissive. As the trial judge properly explained to the jury in the present case, proof of the defendant's presence while the business is being carried on, in the absence of explanation, permits conviction because the jury *may* infer from the proof of presence the conclusion that the defendant was involved in carrying on the business as either principal or accessory (R. 45):

> Now this does not mean that the presence of the defendant at the site and place at the time referred to requires the jury to convict the defendant, if the defendant by the evidence in the case, facts and circumstances proved, fails to explain his presence to the satisfaction of the jury. It simply means that a jury may, if it sees fit, convict upon such evidence, as it shall

be deemed in law sufficient to authorize a conviction, but does not require such a result.

See also *United States* v. *Ivey*, 310 F. 2d 227, 229 (C.A. 4), certiorari denied, 372 U.S. 929. The burdens of introducing proof of each element of the offense and of persuading the jury beyond a reasonable doubt remains upon the government at all times. The court had already charged the jury on the burden of proof (R. 40) and the elements of the offense (R. 41), and had discussed the drawing of factual inferences from proof of presence (R. 44–45):

> * * * I charge you that the presence of defendants at a still, if proved, with or without flight therefrom, or attempted flight therefrom, if proved, would be a circumstance for you to consider along with all the other testimony in the case. Of course, the bare presence at a distillery and flight therefrom of an innocent man is not in and of itself enough to make him guilty. It is possible under the law for an innocent man to be present at a distillery, and it is possible for him to run when about to be apprehended, and such an innocent man ought never to be convicted, * * *.
>
> * * * Presence at a still, together with other circumstances in the case, if they are sufficient in your opinion to exclude every reasonable conclusion except that they were there connected with the distillery, in an illegal manner, having possession and custody and control of it and carrying on the business as charged in these two counts, if you believe those things, would authorize you in finding the defendants guilty.

Thus, the presumption created by section 5601(b)(2) amounts to no more than a declaration of a factual inference which Congress authorizes juries to draw from proven circumstances. Such a presumption is to be sharply distinguished from conclusive presumptions that create a new rule of substantive law[8] or presumptions that shift the burden of introducing evidence merely because of alleged convenience of proof.[9]

The explanation that overcomes the force of the presumption need not come from the defendant personally or even from his evidence. The explanation may be suggested by any evidence of the facts and circumstances, coming from any source (including the government's own witnesses), that explains how an innocent man happened to be there. Or the jury may reject the presumption because it is satisfied that proof of presence, taken in conjunction with all the other circumstances, will not support an inference that the defendant was, beyond a reasonable doubt, guilty of conduct constituting him a principal or accessory in the substantive offense. The judge so charged the jury in the present case (R. 38–45; see, especially, R. 44–45).

In sum, the net effect of section 5601(b)(2) is twofold. First, when presence is proved and is unexplained, the judge must submit the case to the jury despite a motion for acquittal upon the ground that there is insufficient evidence of guilt. Similarly, he

[8] See, *e.g.*, *Heiner* v. *Donnan*, 285 U.S. 312, 327–329; *United States* v. *Provident Trust Co.*, 291 U.S. 272, 281–285.

[9] See, *e.g.*, *Morrison* v. *California*, 291 U.S. 82, 90–97.

must take the jury's verdict against a motion for judgment *non obstante*. Any prior cases holding that proof of unexplained presence is not sufficient to carry a case to the jury are over-ruled.[10] Second, the judge is to instruct the jury that from proof of presence it *may* find that the defendant committed the crime alleged. But the power to convict is not to be exercised whimsically. The jury must address

[10] Actually, there was little to overrule. Indeed, even without the aid of the statute, an inference of participation in the business of running a still under similar circumstances had been recognized—principally by decisions in the Fourth Circuit. See *Barton* v. *United States*, 267 Fed. 174, 175–176 (C.A. 4); *Harding* v. *United States*, 182 F. 2d 524 (C.A. 4). There were, it is true, decisions (principally in the Fifth and Third Circuits) saying that "mere presence at a still site cannot support a conviction for violation of the liquor laws relative to the still." *Fowler* v. *United States*, 234 F. 2d 697, 699 (C.A. 5); see, also, *Vick* v. *United States*, 216 F. 2d 228, 231–232 (C.A. 5); *McFarland* v. *United States*, 273 F. 2d 417, 419 (C.A. 5); *Girgenti* v. *United States*, 81 F. 2d 741, 742 (C.A. 3); *Grunwald* v. *United States*, 94 F. 2d 952, 953 (C.A. 3), certiorari denied, 303 U.S. 663. But, in a number of these cases, the appellate court was of the view that presence had been satisfactorily explained. See note 18, *infra*, p. 29. In some, the charges did not include that of carrying on the business of a distiller. See, *e.g.*, *Graceffo* v. *United States*, 46 F. 2d 852 (C.A. 3); *Girgenti* v. *United States*, 81 F. 2d 741 (C.A. 3); *Cantrell* v. *United States*, 158 F. 2d 517 (C.A. 5). And in others the statement that presence alone is insufficient was made in circumstances unnecessary to the disposition of the case. Thus, in *McFarland* v. *United States*, 273 F. 2d 417, 419 (C.A. 5), the court of appeals found that all the evidence, including presence, was sufficient to support the jury verdict. To the same effect: *Grunwald* v. *United States*, 94 F. 2d 952, 953 (C.A. 3); *Spencer* v. *United States*, 295 F. 2d 536, 537 (C.A. 5); *Matthews* v. *United States*, 217 F. 2d 409, 411 (C.A. 5); *Fowler* v. *United States*, 234 F. 2d 697, 699 (C.A. 5); cf. *United States* v. *Freeman*, 286 F. 2d 262, 265–266 (C.A. 4).

itself to the propriety of the inference in the particular case. All that Congress has done, in effect, is to substitute for judge-made law its statutory views of what inferences are normally permissible.

The primary test of the constitutionality of such a presumption is whether Congress, in the light of the knowledge and experience available, acted arbitrarily in concluding that a jury could rationally derive from the facts giving rise to the presumption an inference that the defendant actually engaged in conduct constituting the crime. Under the procedural safeguards of the Bill of Rights, "where guilt is in issue, a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged" (*Tot* v. *United States*, 319 U.S. 463, 473 (concurring opinion)); "* * * a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Id.* at 467–468. On the other hand, if the circumstances of life as we know them show that it may be rationally permissible to infer from the fact proved that the defendant has also in fact engaged in conduct constituting the crime charged, then the requirements of due process are satisfied even though the inference is not one that a jury ought to draw in every particular case. For, in that event, the government would have introduced evidence which tended to prove each element of the crime. See, in addition to *Tot v. United States, supra*, the earlier decisions in *Mobile, J. & K. C. R.R.* v. *Turnipseed*, 219 U.S. 35, 43;

Luria v. *United States*, 231 U.S. 9, 25–26; *Hawes* v. *Georgia*, 258 U.S. 1, 4; *Yee Hem* v. *United States*, 268 U.S. 178, 184; *Casey* v. *United States*, 276 U.S. 413, 418.

Few, if any, presumptions which satisfy the foregoing requirement will violate the privilege against self-incrimination. Situations frequently develop (almost inevitably, in cases of circumstantial evidence) in the course of criminal trials in which the facts proved by the prosecution will sustain an inference of guilt and thus put the defendant, who best knows any explanation that will dispel the inference, to a choice between coming forward with the explanation and remaining silent at his peril. See *Rugendorf* v. *United States*, 376 U.S. 528, 536–537; *Holland* v. *United States*, 348 U.S. 121, 138–139. The case is no different in principle where a statutory presumption declares the right of the jury to draw the rationally permissible inference, thus binding the court upon a motion to acquit before or after verdict. For the usual case the full answer to any argument based upon the self-incrimination clause was given in *Yee Hem* v. *United States*, *supra*, 268 U.S. at 185, in which the presumption created by the Narcotic Drugs Import and Export Act of 1909 (now 21 U.S.C. 174)—the model for the provisions in suit[11]—was sustained:

[11] That form—"* * * such possession [or presence] shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession [or presence] to the satisfaction of the jury"—derives from Section 4 of the Smuggling Act of 1866, 14 Stat. 178, 179 (presently 18 U.S.C. 545). The latter provision has also been upheld against the charge that

> The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

See, also, *Mobile, J. & K. C. RR.* v. *Turnipseed, supra; Luria* v. *United States,* 231 U.S. 9, 25–26; *Rossi* v. *United States,* 289 U.S. 89, 91–92; *Morrison* v. *California,* 291 U.S. 82, 88–89, 90–91; *United States* v. *Fleischman,* 339 U.S. 349, 361–363; *Holland* v. *United States,* 348 U.S. 121, 138–139; *Rugendorf* v. *United States,* 376 U.S. 528, 536–537.

The exceptional case in which the presumption may be unconstitutional even though there is a rational inference from the evidence giving rise to the presumption of the ultimate fact to be proved is suggested by

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it violates the privilege against self-incrimination. *Friedman* v. *United States,* 276 Fed. 792, 794–795 (C.A. 2); cf. *United States* v. *Goldstein,* 323 F. 2d 753, 754 (C.A. 2).

Tot v. *United States*, *supra*, where the statute was so drawn as to require every defendant who wished to testify in rebuttal of the presumption, to admit the commission of other crimes. In *Tot* the presumption that the firearm in defendant's possession had been received in interstate commerce arose only if the defendant was shown to have been convicted of a crime of violence or to be a fugitive from justice. Since a defendant's own testimony would normally be necessary to overcome the presumption, the statute virtually compelled every defendant who wished to give an innocent explanation of his possession to submit himself to cross-examination that would surely be prejudicial to his defense.

No such case is presented here. The statute is not drawn in such a way that the presumption arises *ex hypothesi* only against defendants vulnerable upon cross-examination. Nor is the statute so drawn that the defendant is always put to a choice between allowing the presumption to operate and confessing his guilt of some other offense. Whatever its scope, the second test of constitutionality applied in *Tot* has no relevance to the instant case.

B. PROOF OF PRESENCE AT THE SITE OF AN ILLICIT "GOING" STILL GIVES RATIONAL SUPPORT FOR THE INFERENCE THAT THE DEFENDANT IS ENGAGED IN CONDUCT MAKING HIM GUILTY, AS EITHER PRINCIPAL OR ACCESSORY, OF THE CRIME OF CARRYING ON THE BUSINESS OF DISTILLER WITHOUT BOND

Since the constitutionality of section 5601(b)(2) depends upon whether proof of the defendant's presence gives rise, in fact, to what Congress might rationally consider a permissible inference that he has en-

gaged in some form of conduct constituting the substantive offense charged, it is essential to analyze with some care the elements of the substantive crime. For the rationality of the authorized inference depends not only upon logical applications of the lessons to be drawn from experience but also upon the ultimate facts to be proved.

1. The substantive offense

The crime proscribed by section 5601(a)(4) is—

> Carr[ying] on the business of a distiller or rectifier without giving bond as required by law.

The court of appeals took an impermissibly narrow view of that offense. After holding that presence at the site of an unregistered still would not support an inference of possession in the narrow sense of custody or control, the court went on to say (R. 67) that section 5601(b)(2) must, *a fortiori,* fall because—

> Certainly, there is far less ground for the probability of this inference—which, in fact, is a double one, from presence to possession to carrying on a business without bond—than there is for the first one.

The court's assumption that one cannot be guilty of carrying on business of a distiller without bond without first being proved guilty of possession of an unregistered still is directly opposed to *Bozza* v. *United States,* 330 U.S. 160. In that case this Court squarely held that proof that the defendant helped to make alcohol for the main-mover in the interprise, and occasionally carried it away, was ample support for a conviction of carrying on the business of a dis-

tiller with intent to defraud the United States, even though the same proof was not evidence of the narrower offense of possession. Thus the class of persons present at a still who may be guilty of engaging in the business of a distiller is broader, not narrower, than the class who may be guilty of possession as defined in *Bozza*. The court below evidently forgot that anyone who aids or abets may be convicted as a principal. And anyone who assists in the operation or maintenance of a clandestine still, at the still, is obviously aiding and abetting the illicit operation. 18 U.S.C. 2.

Section 5601(a)(4) accordingly encompasses many more classes of persons than the court below supposed. Not only has it long been settled that employees of every description are equally liable with the owner or operator for engaging in illegal distilling, as held in *Bozza* (albeit with respect to the offense of "carrying on the business of a distiller * * * with intent to defraud the United States of the tax [due]"),[12] but the same ruling has been made under section 5601(a)(4) against one who was caught tending a still where the "main mover" in the illegal transaction testified that the defendant came out "[o]nce in a while" to help him. *Occinto* v. *United States*, 54 F. 2d 351, 353 (C.A. 8); *Cvitkovic* v. *United States*,

[12] The difference between the two provisions is of no importance here, since both require the initial finding that the defendant is helping to "carry on the business of a distiller." Indeed, as the dissenting opinion in *Bozza* points out (330 U.S. at 168 and n. 2), greater involvement might be called for before one may be said to be aiding in defrauding the government.

41 F. 2d 682, 684 (C.A. 9), certiorari denied, 282 U.S. 871; see, also *Hays* v. *United States*, 123 F. 2d 53, 54 (C.A. 5), certiorari denied, 315 U.S. 801; *Rewis* v. *United States*, 242 F. 2d 508 (C.A. 5).

Guilt also attaches to one who assists the business by hauling the raw materials to the still or the finished product away from it. *Parente* v. *United States*, 82 F. 2d 722, 725 (C.A. 8); *United States* v. *Giuliano*, 263 F. 2d 582, 585 (C.A. 3).[13]

Similarly, those who contribute to the operation as suppliers or customers are guilty as principals in carrying on the business of a distiller. *Spencer* v. *United States*, 239 F. 2d 5, 7 (C.A. 5); *McIntire* v. *United States*, 217 F. 2d 663, 667 (C.A. 10), certiorari denied, 348 U.S. 953; *Vukich* v. *United States*, 28 F. 2d 666 (C.A. 9), certiorari denied, 279 U.S. 847; *United States* v. *Pritchard*, 55 F. Supp. 201 (D.S.C.), affirmed, 145 F. 2d 240 (C.A. 4).

In short, anyone present at an operating or operable still who has any connection with the enterprise is as liable as the owner or operator for the offense of carrying on the business of a distiller without

[13] In *Wainer* v. *United States*, 82 F. 2d 305, 307 (C.A. 7), certiorari granted, limited to a question not here material, 298 U.S. 652, and affirmed, 299 U.S. 92, it was held that an employee without proprietory interest may be held accountable as an aider and abettor in the carrying on, without payment of the required federal tax, of the business of a wholesale liquor dealer. As the court said (82 F. 2d at 307): "Obviously, a servant will aid and abet another in the carrying on of such business and become a principal if, with knowledge of the business, its purpose and its effect, he consciously contributes his effort to its conduct and promotion, however slight his contribution may be."

giving bond. Such a person obviously "helps" the distiller to "carry on the business."

The propriety of giving the offense of carrying on the business of a distiller without bond a broad interpretation, when read in conjunction with the aider-and-abettor statute, is confirmed by the elaborate detail in which Congress has interdicted every meaningful form of participation in, or assistance to, violations of the alcohol tax laws. No one at the site of a clandestine still, having any relation to the enterprise, could fairly argue that Congress did not mean to make his conduct criminal or that he lacked notice that his participation was a crime.

Thus, there are many provisions applicable to the owners and operators, besides section 5601(a)(4). Before a still is set up, a permit must be obtained (26 U.S.C. 5105(a)). Immediately thereafter, the distiller must register his still (§§ 5171(a), 5179) and, before distilling begins, he must obtain an operating permit (§ 5171(b); see, also, 27 U.S.C. 203(b)(1)), post a qualification bond (§ 5173; see, also, § 5222(a)(1)), and display a sign on the premises disclosing his name and occupation (§ 5180(a)). When production occurs, the distiller must pay the gallonage tax imposed (§§ 5001(a)(1), 5005(b)(1), 5006(c)(2)); and, before removal from the premises, the spirits must be transferred to stamped containers (§ 5205(a)(2)). For obvious reasons, the "moonshiner" ignores each of these requirements. So doing, he violates at least eleven specific criminal penalty provisions of the Internal Revenue Code: (1) possessing an unregistered still (§ 5601(a)(1)), (2) engaging in the busi-

ness of a distiller without having applied for registration (§ 5601(a)(2)), (3) carrying on the business of a distiller without having posted the required bond (§ 5601(a)(4)), (4) making mash on premises other than a licensed "distilled spirits plant" (§ 5601(a)(7)), (5) unauthorized production of distilled spirits (§ 5601(a)(8)), (6) bottling spirits with knowledge that the tax due has not been paid (§ 5601(a)(11)), (7) unauthorized removal of distilled spirits from the place of manufacture (§ 5601(a)(12)), (8) carrying on the business of a distiller with intent to defraud the United States of the tax due (§ 5602), (9) possessing, selling and transferring spirits in unstamped containers (§ 5604(a)(1)), (10) engaging in distilling without displaying the required sign (§ 5681(a)), and (11) possessing liquor and property used or intended for use in violation of the alcohol tax law (§ 5686(a)).[14] In some instances, perhaps, culpability attaches to the still owner alone. But it is well settled that the actual operator on the premises, whether as such or as an aider or abettor of the owner, is equally amenable to criminal sanctions as a "possessor" and as an unauthorized "distiller."

[14] The distiller may also be guilty of wilful tax evasion (26 U.S.C. 7201) or wilful failure to pay a tax or to keep required records (26 U.S.C. 7203). See, also, the civil tax penalties imposed by § 5684. Doubtless, the "moonshiner" ignores the statutory and regulatory provisions relating to records and reports (§ 5207(a), (c)), and thereby subjects himself to the penalties imposed by Section 5603, paragraphs (a)(1) and (b)(1). And, finally, he may be amenable to Section 5606 for disregarding the container regulations of the Secretary issued pursuant to Section 5301(a).

Employees of the distiller are not only punishable under the several provisions prohibiting the handling of any property or spirits appertaining to an illicit still (§ 5686(a); see, also, §§ 5601(a)(11), 5604(a)(1), 5606), but are subject to the criminal penalties imposed on all those who work at still where the required sign is not displayed (§ 5681(c)).

While, as we are informed, most "moonshiners" themselves transport their own equipment and raw materials to the still site, the supplier found on the premises is subject to the special provision which makes it a crime to knowingly "carry or deliver any grain, molasses, or other raw material to any distillery on which [the required] sign is not placed and kept" (§ 5681(c)), and to the general prohibition on "possess[ing] any * * * property intended for use in violating any provision of [the alcohol tax law]" (§ 5686(a)). It may also be noted that the provisions just recited are equally applicable to a mere carrier for the supplier.

The "moonshiner" does not normally sell his product at the still site. But, in any event, customers of an illicit distillery, besides liability for aiding or abetting its operation, are subject to other charges. Section 5681(c), cited against suppliers, likewise punishes everyone who "knowingly receives at, or carries or conveys any distilled spirits * * * from any [unposted] distillery." There are, moreover, express penal sanctions against "purchas[ing] [or] receiv-[ing] * * * any distilled spirits, knowing or having reasonable grounds to believe that any tax due on such spirits has not been paid or determined as re-

quired by law" (§ 5601(a)(11)), against "removing" any non-tax-paid liquor "from the place of manufacture" (§ 5601(a)(12)), and against "transport[ing], possess[ing], buy[ing] * * * or transfer[ring]" distilled spirits in an unstamped container (§ 5604(a)(1)). See, also, §§ 5601(a)(9)(A), 5686(a). Thus, even without invoking the aider and abettor statute, it is plain that customers of the distiller are guilty under the alcohol tax law.[15]

It will doubtless be argued, quoting the *Bozza* opinion, that "[t]he Internal Revenue Statutes have broken down the various steps and phases of a continuous illicit distilling business and made each of them a separate crime" (330 U.S. at 163);[16] and the government, of course, must prove the crime charged. The provisions now gathered in Chapter 51 come from separate statutes enacted at different times. It is entirely clear that Congress used extreme care and many partially redundant provisions in order to be sure to make criminal every activity circumventing the alcohol tax. The specificity of some offenses, such as "making mash" has no tendency to prove that all are to be given a narrow interpretation. Section

[15] Most of the provisions cited carry the same penalty, $10,000 fine, 5 years' imprisonment, or both. See §§ 5601, 5602, 5603(a), 5604(a), 7201. It seems clear that each of the persons mentioned is amenable to one or more of these penalties, whether as aiders and abettors, or otherwise. Lesser penalties are imposed by Sections 5603(b), 5606, 5681, 5686(a), 5687, 7203, and 27 U.S.C. 207.

[16] While the relevant provisions have twice been recodified since the decision in *Bozza* (68A Stat. 595 (1954), 72 Stat. 1313 (1958)), the general scheme of fragmented offenses has remained unchanged.

5601(a)(4) obviously overlaps other offenses such as "making mash" (§ 5601(a)(7)) and possessing spirits in unstamped containers (§ 5604(a)(1)). There are many other, similar instances of duplication and overlapping. If consecutive sentences were imposed, or if a defendant were subjected to successive trials, serious problems of statutory construction and double jeopardy might be raised, but no such problems are presented here. The real significance of the network of related provisions is not that each crime must be narrow. It is that no one could be at a still except as a stranger without notice that his conduct was criminal. They also show that there is no chance that in giving section 5601(a)(4) the full scope warranted by the precedents, the Court would encompass conduct that Congress did not intend to proscribe.

2. The inference

Since the government, in order to convict under section 5601(a)(4) need prove only that the defendant was present and helping in some capacity in the maintenance or operation of an illicit still, or in deliverng supplies or carrying away distilled liquors, the constitutionality of the presumption created by section 5601(a)(2) depends upon whether proof of presence, along with common knowledge and experience, supplies a factual foundation from which a jury could rationally draw the inference, in the absence of some other satisfactory explanation of the defendant's presence, that he was there because he was thus helping in the enterprise. And since there is no need to find whether the defendant is a principal or acces-

sory, or in what capacity he is helping, the strength of the inference depends entirely upon whether other persons are likely to be present at the still.

We submit that there is no significant likelihood that any person not connected with or aiding the enterprise would be found present at the operation of an illicit still. Illicit stills are invariably clandestine. Since the success of the enterprise depends upon secrecy, and the penalties are heavy, the operators invariably keep to an absolute minimum the number of persons admitted to the premises. Employees and casual helpers, lookouts or guards, deliverers of sugar, grain and fuel, transporters of the alcohol, and perhaps a mechanic making repairs, might well be found there. Mere presence, of course, would not identify the capacity in which any one man was aiding or abetting the operation of the business; but that gap is irrelevant when the indictment is under section 5601(a)(4) because the aider and abettor would be equally guilty whatever his capacity. In the cities stills are operated illicitly in warehouse or industrial districts. The premises are closed to visitors. In the country stills operate in isolated areas. There are few passers-by. Any casual visitor is quickly discouraged. By accident a hunter, hiker or fisherman might stumble onto the still but the likelihood is very, very small. Other rural possibilities—a lost motorist or an airman who parachuted to safety—are even more remote. In the city one can imagine the premises being entered by a building inspector, an employee of a utility seeking to trace a breakdown, a process server or, perhaps, members of

a rival gang, but the chance that any one of them will be present is very small indeed. In either locale there is some chance that an operator of the still might stop at the premises accompanied by a friend or relative close enough to be trusted with such dangerous information, but the importance of secrecy is so great that even this possibility is relatively slight.

We must remember that the presumption operates only when the business is being "carried on."[17] That is not say that production must actually be taking place. But there must be signs that a "going business" is involved, albeit the apparatus is enjoying a normal respite. See *United States* v. *McGee*, 315 F. 2d 479, 481 (C.A. 6); *Rewis* v. *United States*, 242 F. 2d 508, 509, (C.A. 5); cf, *Liverman* v. *United States*, 260 F. 2d 284, 285 (C.A. 4). At such a time when operations are in process, it is especially unlikely that any stranger will be permitted to wander onto the premises, even if he should lose his way. It seems safe to say, therefore, that out of every hundred persons ever "present" when an illicit still is being operated, no more than one would be a stranger to the enterprise.

There is even less chance that anyone unconnected with the operation of the illicit enterprise would be found present at the time of the raid by revenue agents or local police. Innocent visits or intrusions would always be brief. Only by extraordinary mis-

[17] The phrase "carrying on the business" is not defined because it has its normal meaning. *Ramsey* v. *United States*, 245 F. 2d 295, 297 (C.A. 9); cf. *Kahn* v. *United States*, 251 F. 2d 160, 162 (C.A. 9), certiorari denied, 356 U.S. 918.

chance would the rare innocent visit coincide with the raid by enforcement officials.

Under such circumstances it is entirely reasonable to authorise a jury to draw from unexplained presence an inference of participation, and therefore of guilt. Indeed, such an inference would be permissible, and would often be drawn, in the absence of legislation.

We recognize, of course, that cases can be imagined in which the circumstances make the normal inference impermissible. It might be arbitrary, for example, to allow a jury to convict a defendant under section 5601(a)(4) where the only evidence against him was that he was present on a path running past the back door of a rural still carrying a fly-rod, waders and a creel, and headed towards a brook.[18] In such a case, however, the very proof of the defendant's presence furnishes the facts constituting necessary

[18] Cf. *Vick* v. *United States*, 216 F. 2d 228, 230 (C.A. 5), where the government's own evidence revealed that, while others were working at the still, the defendant was "sitting on the ground in the vicinity of the distillery"; that there was a regular trail leading to the distillery which itself was located in the middle of a good hunting country; and that the defendant was in possession of a hunting rifle. A co-defendant testified that Vick, who was related to others operating the still, had been there but a short time and had done nothing at the still but take a drink. See *McFarland* v. *United States*, 273 F. 2d 417, 419 (C.A. 5), *Ingram* v. *United States*, 241 F. 2d 708, 709 (C.A. 5), and *Corbin* v. *United States*, 253 F. 2d 646, 650 (C.A. 10), explaining *Vick* as ruling that the defendant's presence at the still had been satisfactorily explained.

There was also a plausible explanation for presence at the still site in *Graceffo* v. *United States*, 46 F. 2d 852 (C.A. 3), and *Cantrell* v. *United States*, 158 F. 2d 517 (C.A. 5). Cf. *Girgenti* v. *United States*, 81 F. 2d 741 (C.A. 3).

explanation; the jury could not rationally find it unsatisfactory, and the court should enter a judgment of acquittal. Since all the other extreme cases can apparently be handled in like fashion, there appears to be no danger that the statutory presumption created by section 5601(b)(2) would ever require the court to permit the jury to convict even though the inference upon which its verdict would rest was patently unreasonable under the particular circumstances. Should such a case arise, it would be time enough to consider the constitutionality of section 5601(b)(2) as applied to that defendant. The present case is manifestly different.

For the foregoing reasons we urge that the presumption created by section 5601(b)(2) does no more than authorize the jury to draw an entirely reasonable inference from proven facts. But even if one disagreed with Congress concerning the force of the inference, the constitutionality of the statute should be sustained because, surely, Congress, upon the facts available to it, could reasonably conclude that the inference was permissible. The country has had experience with illegal distilling operations since the founding of the Republic [19] and they continue on a large

[19] The first "moonshiners" were presumably those who provoked the "Whiskey Rebellion" of 1794, after the first federal tax on domestic distilleries and distilled spirits was imposed. See Act of March 3, 1791, §§ 14, 15, 21, 1 Stat. 199, 202, 203, 204. See, also, the Act of July 24, 1813, 3 Stat. 42, construed in *United States* v. *Tenbroek*, 2 Wheat. 248. The present comprehensive alcohol tax provisions derive, for the most part, from the Act of July 20, 1868, 15 Stat. 125. See, *e.g.*, *United States* v. *Singer*, 82 U.S. (15 Wall.) 111; *United States* v. *Simmons*, 96 U.S. 360. For the antecedents of the substantive

scale."[20] We are informed by the Internal Revenue Service that, in most instances, illegal distilleries are operated in locations where observation and surveillance are very difficult and that, frequently, lookouts are employed who, by means of buzzer systems or other similar methods, signal their co-workers of the approach of government agents and thereby give sufficient advance notice of a pending raid. This permits the discontinuance of overt illegal activity, although it does not provide sufficient time to escape. The net effect is that, when the officers come upon the still, they find that, while numerous persons are present, none are actually working. In a word, it is wholly

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penal provisions here involved, see §§ 5 (possession of an unregistered still) and 44 (carrying on the business of a distiller without having posted bond) of the 1868 Act, 15 Stat. 126. 142–143.

It is interesting to note that there was a presumption incorporated in the first alcohol tax law. After taxing country stills "employed" in the manufacture of distilled spirits (Act of March 3, 1791, § 21, 1 Stat. 199, 204), that statute provided (*id.*, § 22): "That the evidence of the employment of the said stills shall be, their being erected in stone, brick or some other manner whereby they shall be in a condition to be worked."

Despite extended and heated debate in the First Congress (which included Madison and the other draftsmen of the Bill of Rights) over the adoption of a measure taxing domestic spirits, no one seems to have objected to this provision. See, *e.g.*, 2 Ann. of Cong. 1842–1845, 1846–1852, 1852–1853, 1857–1861, 1870–1872, 1873–1875, 1876–1878, 1880–1882. See, also *id.*, at 1551–1552, 1633–1634, 1636–1638, 1642–1644, 1751, 1752, 1753, 1754–1755, 1761–1762, 1764–1765, 1769, 1770–1771, 1838, 1862, 1879, 1883, 1884, 1963, 1963–1964, 1966, 1968, 1969, 1971.

[20] Official figures provided by the Alcohol and Tobacco Tax Division of the Internal Revenue Service show that from 1958 through 1963, some 37,440 illegal stills have been seized by enforcement agents.

contrary to reality to say, as did the court below, that the presumptions are unreasonable because they fail to take into account the fact that the innocent as well as the guilty may be found at the site of an illegal still (322 F. 2d at 300). Congress could validly accept the judgment of those charged with every day enforcement of the liquor laws that presence at a still site when the business of distilling is going on is a meaningful signal of criminal association with the illegal enterprise.

II

SECTION 5601(b)(1) IS CONSTITUTIONAL

Count One of the indictment charged the defendants under section 5601(a)(1), which declares guilty of a criminal offense any person who—

> Has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered * * *

Section 5601(b)(1) provides that proof that the defendant was "at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered"[21] shall be sufficient evidence to authorize conviction unless the defendant explains his presence to the satisfaction of the jury.

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[21] A still is "set-up" under the statute when, though some minor adjustment may be necessary, it is essentially capable of immediate operation. See *United States* v. *Moses*, 205 F. 2d 358, 359 (C.A. 2); *Otto* v. *United States*, 29 F. 2d 504, 505 (C.A. 7); *United States* v. *Cafero*, 55 F. 2d 219, 220 (C.A. 2); *Colasurdo* v. *United States*, 22 F. 2d 934, 935 (C.A. 9). Unless a still is "set up" within these standards, the registration requirements of the statute do not apply. *Liverman* v. *United States*, 260 F. 2d 284, 286 (C.A. 4).

In *Bozza* v. *United States*, 330 U.S. 160, 163–164, this Court gave the substantive offense of possessing an unregistered still a rather narrow construction, pointing out that while such offenses as illicitly carrying on the business of a distiller embraced a broader class, the offense of possession could not be extended beyond those who had the actual "custody or possession" or who acted "in any other capacity calculated to facilitate the custody or possession, such as, for illustration, service as a caretaker, watchman, lookout, or in some similar capacity." The court of appeals followed that definition (R. 64–65). If it is current law, the inference from the mere fact of presence at a still when it is set up to the conclusion that the defendant committed acts constituting this substantive crime may well be too tenuous to satisfy the Fifth Amendment, for it is not at all unlikely, as *Bozza* shows, that a person found on the premises, even at an operative still, is a supplier, a customer, or a workman aiding in the operation but neither having nor aiding possession or custody in the narrow sense. Such a presumption, moreover, might be thought to put an unjust burden upon the defendant, for to give the most likely explanations of presence consistent with innocence under section 5601(b)(1) would be to admit his guilt of crimes under other provisions of the alcohol tax laws (See pp. 22–25 *supra*).

We submit, however, that the narrow definition given to "possession" in *Bozza* was overruled and the substantive crime was redefined by the 1958 amendments in such a way as to include all those present at an operable still in connection with the illicit

enterprise. All those present and connected with the enterprise are, in a very substantial sense, assisting in the enterprise's possession, custody or control and if that is now the meaning of "possession," as we think it is, then the unlikelihood that anyone else would be present is sufficient to sustain the constitutionality of the presumption under the principles stated in Point I.

At first blush this may seem a large burden to rest upon the 1958 amendments.[22] In language and form they added only the presumption created by section 5601(b)(1) and left the words of section 5601(a)(1) untouched. But the definition of "possession" is not in the statute and the meaning of Congress must be derived not only from the words of section 5601(a)(1) but also from its context and other evidence of congressional intent. And the result is plainly what Congress intended. The legislative history is explicit that the provisions in suit were "designed to avoid

[22] A somewhat similar contention was rejected in *Tot* v. *United States*, *supra*, 319 U.S. at 472, partly on the ground that it did not jibe with the legislative purpose. There, the government's argument was that, since Congress might have prohibited the possession of firearms by ex-felons, whether or not acquired in interstate commerce, there could be no objection to a mere presumption that the weapon was purchased from interstate commerce. Pointing out that this reasoning, in any event, did not support the presumption of acquisition after the effective date of the Act, the Court added: "it is plain that Congress, for whatever reason, did not seek to pronounce general prohibition of possession by certain residents of the various states of firearms in order to protect interstate commerce, but dealt only with their future acquisition in interstate commerce." The critical difference here is that, in the present instance, the congressional intent to broaden the offense seems plain.

the effect of [this Court's] holding [in *Bozza* v. *United States*] as to future violations." S. Rep. No. 2090, 85th Cong., 2d Sess., p. 189; H. Rep. No. 481, 85th Cong., 1st Sess., p. 175.[23] Read against the ruling in *Bozza* that a helper of the distiller could not be deemed to "possess" the still, Congress seems here to be saying, as respects the offense of possession: "the Court notwithtanding, henceforth, not only actual custodians, but all those connected by physical

[23] These Reports relate to the many changes worked by the Excise Technical Changes Act of 1958 and focus only briefly on the new statutory presumptions added. In identical language borrowed from an analysis prepared by the Alcohol and Tobacco Tax Division of the Internal Revenue Service (see *Hearings Before a Subcommittee of the House Committee on Ways and Means on Excise Tax Technical and Administrative Problems* Part I, 84th Cong., 1st Sess., p. 208; see also *Hearings*, id., Part III, p. 95), the relevant portions of the House and Senate reports read:

"* * * These paragraphs are new. Their purpose is to create a rebuttable presumption of guilt in the case of a person who is found at illicit distilling or rectifying premises, but who, because of the practical impossibility of proving his actual participation in the illegal activities except by inference drawn from his presence when the illegal acts were committed, cannot be convicted under the ruling of the Supreme Court in *Bozza* v. *United States* (330 U.S. 160).

"The prevention of the illicit production or rectification of alcoholic spirits, and the consequent defrauding of the United States of tax, has long been rendered more difficult by the failure to obtain a conviction of a person discovered at the site of illicit distilling or rectifying premises, but who was not, at the time of such discovery, engaged in doing any specific act.

"In the Bozza case, the Supreme Court took the position that to sustain conviction, the testimony 'must point directly to conduct within the narrow margins which the statute alone defines.'. These new provisions are designed to avoid the effect of that holding as to future violations."

proximity to the distillery, and not present by mere innocent accident, shall be considered to 'possess' it."

There can be no serious doubt as to the legitimacy of the end in view. We have already noticed that all those who have anything to do with an illicit distillery are in fact amenable to the alcohol tax law. It cannot be wrong to hold them as aiders and abettors in "possession," rather than on another offense. Labels are not so sacred. In any event, the term is subject to that broad construction (cf. *United States* v. *Rappy*, 157 F. 2d 964, 966–967 (C.A. 2, L. Hand, J.), certiorari denied, 329 U.S. 806; *United States* v. *Santore*, 290 F. 2d 51, 76–78 (C.A. 2), certiorari denied, 365 U.S. 834), and no violence is done if Congress chooses to view those who work at a still, or do business with it, as accessories to its "possession." Nor can there be any real claim of surprise. Everyone knows (or is presumed to know) that involvement with an illicit still is a criminal offense. Adequate warning has been given. That the crime is now termed "possession" does not invalidate the notice.

As applied to such an enlarged concept of possession, the inference derived from presence is, of course, wholly reasonable. By hypothesis, all those at the still for business reasons are deemed possessors, and, as we have already noted, no one else is at all likely to be there. For the remote case of the stray wanderer who happens upon an operative still, the opportunity for explanation is sufficient protection, either by way of rebuttal or because the explanation is apparent from the government's case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court of appeals reversing respondent's conviction on Counts 1 and 2 should be reversed.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

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APPENDIX

Provisions of the alcoholic tax chapter of the Internal Revenue Code (26 U.S.C.) creating presumptions similar to those involved in this case and enacted at the same time (72 Stat. 1398, 1410).

1. *Unlawful production, removal or use of material fit for production of distilled spirits.*

Substantive provision (§ 5601(a)(7)):

> Except as otherwise provided in this chapter, makes or ferments mash, wort, or wash, fit for distillation or for the production of distilled spirits, in any building or on any premises other than the designated premises of a distilled spirits plant lawfully qualified to produce distilled spirits, or removes, without authorization by the Secretary or his delegate, any mash, wort, or wash, so made or fermented, from the designated premises of such lawfully qualified plant before being distilled; * * *

Presumption (§ 5601(b)(3)):

> Whenever on trial for violation of subsection (a)(7) the defendant is shown to have been at the place in the building or on the premises where such mash, wort, or wash fit for distillation or the production of distilled spirits, was made or fermented, and at the time such mash, wort, or wash was there possessed, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

2. *Unlawful production of distilled spirits.*

Substantive provision (§ 5601(a)(8)):

> Not being a distiller authorized by law to produce distilled spirits, produces distilled spirits by distillation or any other process from any mash, wort, wash, or other materials; * * *

Presumption (§ 5601(b)(4)):

> Whenever on trial for violation of subsection (a)(8) the defendant is shown to have been at the site or place where, and at the time when, such distilled spirits were produced by distillation or any other process from mash, wort, wash, or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

3. *Premises where no sign is placed or kept.*

Substantive provision (§ 5681(c)):

> Every person who works in any distillery, or in any rectifying, distilled spirits bottling, or wholesale liquor establishment, on which no sign required by section 5115(a) or section 5180 (a) is placed or kept, and every person who knowingly receives at, or carries or conveys any distilled spirits to or from any such distillery, or to or from any such rectifying, distilled spirits bottling, or wholesale liquor establishment, or who knowingly carries or delivers any grain, molasses, or other raw material to any distillery on which said sign is not placed and kept, shall forfeit all vehicles, aircraft, or vessels used in carrying or conveying such property and shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

Presumption (§ 5681(d)):

> Whenever on trial for violation of subsection (c) by working in a distillery or rectifying

establishment on which no sign required by section 5180(a) is placed or kept, the defendant is shown to have been present at such premises, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

U.S. GOVERNMENT PRINTING OFFICE: 1964

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 13

UNITED STATES OF AMERICA,
Petitioner,

vs.

JACKIE HAMILTON GAINEY and CLEVELAND JOHNS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

JOSEPH H. DAVIS
J. SEWELL ELLIOTT
Suite 506 Persons Building
Macon, Georgia
Counsel for Respondents

September 11, 1964

INDEX

SUBJECT INDEX

BRIEF OF THE RESPONDENTS

CITATIONS

CASES:

STATUTES:

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BRIEF FOR THE RESPONDENTS

Subsequent to the entry of judgment in the court below respondent Roy Lee Barrett died. Respondent Cleveland Johns elected to commence the service of his sentence immediately following his conviction and has now been released on parole. Consequently, we respectfully request the case proceed only in the names of Jackie Hamilton Gainey and Cleveland Johns as respondents.

Respondents accept the portions of the petitioner's brief citing the opinion below, the jurisdictional statement, the question presented, the statutes involved and the statement of the case. Such present the relevant matters before this Court for the determination of the question presented.

Argument and Authorities

Sections 5601(b)(1) and 5601(b)(2) are unconstitutional in that there is no rational or reasonable connection between the fact proved, i.e. presence and the facts presumed i.e. possession, custody or control on the one hand and carrying on the business of a distiller on the other.

The rule we believe applicable in determining the validity of these two statutory presumptions is easily stated but difficult of application. In substance, it is that there must be a rational or reasonable connection between the fact proved and the fact presumed. *Tot* v. *United States*, 319 US 463. What constitutes such gives rise to the difficulty. Where the inference is so strained as to not have a reasonable relation to the circumstances of life as we know them, it is not competent for Congress to create such as a rule governing procedure in court. As the court below pointed out, under *Tot* it is not enough that the fact proved be relevant to the ultimate fact presumed. The fact proved must also carry an inference of the fact presumed.

We note from petitioner's brief (page 8) that it approaches this problem on the theory of expanding or enlarging upon the meaning of the statutory provisions outlining the offense of carrying on the business of a distiller without having given bond. See Sec. 5601(a)(4). Further, petitioner agrees that if each of the crimes charged covers only the narrow range of conduct supposed by the court below, then the statutory presumptions "may well be unconstitutional because the facts required to be proved may not rationally support the inference that the respondents in fact engaged in such activities." It takes the position that Sec. 5601(a)(4) covers the activities of any person at all *likely* to be present at the site of an operable

still. Respondents cannot accept this interpretation of Sec. 5601(a)(4) for the simple reason that if such is a correct interpretation, then there would be little or no need for Congress to descend to the particulars that it has in proscribing as criminal practically every phase of the process of distilling illicit whiskey. As pointed out by the petitioner, there are some eleven separate and distinct criminal offenses covering such an operation.

Nor does it help petitioner to attempt to uphold the validity of the presumption relating to carrying on the business of a distiller on the theory that respondents might have been accessories or aiders and abettors in the criminal enterprise. As we view the evidence, they were either principals or not. We think it a fair statement that the evidence does not reveal any acts or conduct on their part tending to type them as aiders or abettors to others insofar as this operation was concerned. The aiding and abetting statute simply provides for the conviction of one for an offense when he knowingly and purposefully aids or abets in the commission of that particular offense. Judge Learned Hand in *United States* v. *Peoni*, 100 F2d 401, at page 402, defines the meaning of aiding and abetting, concluding that the words used in the statute carry an implication of purposive attitude and that the definitions have nothing to do with the probability that the forbidden result would follow upon the accessory's conduct. Actually, whether respondents were principals or accessories is immaterial inasmuch as the government still has the burden of proving them guilty of the particular offense for which they were charged beyond a reasonable doubt, and this includes the proof of each of the particular elements of each offense.

At the outset, therefore, it would seem appropriate to discuss whether or not this Court can, as has been suggested by petitioner, enlarge, expand or redefine what con-

stitutes the possession, custody or control of an illicit distilling apparatus or what constitutes carrying on the business of a distiller. In this connection, it is significant to note that Congress, in passing the presumption statutes that we are dealing with, was concerned with overruling *Bozza* v. *United States*, 330 US 160.

Admittedly the presumption statutes here involved were passed by Congress in an effort to facilitate the prosecution of those apprehended at or near the scene of illicit distilling operations. Such had been rendered difficult if not impossible in some instances under the ruling of this Court in *Bozza*. It is interesting, however, to note that Congress did not see fit to redefine in any manner the substantive offenses relating to the possession of an illicit distilling apparatus or engaging in the business of a distiller with intent to defraud the United States of taxes. Instead, Congress attempted to solve the problem of prosecution in these cases by in effect presuming the defendant to be guilty by virtue of his mere presence, thereby casting the burden upon him of coming forward with some satisfactory evidentiary explanation of his presence. Such indeed "gives short shrift to the constitutional privilege" as indicated in the court below.

We recognise that this Court must give weight to the legislative judgment that the presumptions here involved are reasonable. It must ascertain whether it is reasonable for Congress to find it is reasonable for a jury to find the presumed fact beyond a reasonable doubt. We must look to the legislative history of the statutes in order to determine whether Congress was acting upon knowledge not otherwise available to the courts. The legislative history of these statutes does not offer any evidence that Congress had found that experience showed a sufficient rational connection between presence at an illicit still and possession

or carrying on the business of a distiller without having given bond. Instead, we find that its specific purpose was to overrule that part of *Bozza* in which this Court had held in effect that presence at a still was insufficient for conviction of possession.

The burden is always upon the prosecution as it should be to prove guilt beyond a reasonable doubt. Therefore, we see that the presumptions are an attempt on the part of Congress to circumvent the prior holding of this Court and those of the appellate courts, particularly, those within the Fifth Circuit wherein a good many decisions have been entered dealing with the insufficiency of mere presence at the scene of an illicit distillery. However, in order to convict of the various crimes contained in Sec. 5601 of the Internal Revenue Code of 1954, it requires now as it did in 1947 or 1958, that the prosecution prove its case beyond a reasonable doubt including proof of the essential elements necessary to constitute each of these crimes.

It is not clear whether or not the presumption statutes have been interpreted by the court below as shifting the burden of going forward with credible evidence. The words of the statute "to the satisfaction of the jury" seem to imply that the burden has shifted to the defendant so that he must persuade the jury by preponderance of the evidence that the presumed fact is false. Further, those words indicate that the trial judge is prohibited from dismissing the presumption even after rebutting evidence had been introduced since such must be explained to the satisfaction of the jury. We have, therefore, an increased burden cast on a defendant under this interpretation if such be correct. That increased burden requires a stricter test of reasonableness or rationality to uphold the validity of the presumptions.

The major difficulty in upholding the inference of "possession" and "carrying on" the business of a distiller from proof of mere presence is that the process or activity of illicit distilling has been broken down into so many different —yet closely related—crimes that it is impossible to say that mere presence necessarily means possession in the highly technical sense of dominion or control or either the carrying on of the business of a distiller. These presumptions, if valid, are sufficient alone to establish the ultimate issue of guilt. Therefore, this Court must test their validity by asking whether a reasonable jury could find beyond a reasonable doubt that the presumed fact is true if the basic fact is true. Such cannot be done without a strained inference.

Again, we are brought back to the relationship of mere presence to that of possession and carrying on the business of a distiller. If it could be likely these respondents were at the scene of this illicit distillery for any other unlawful purpose than that of possessing the still or carrying on the business of a distiller, then we cannot say that the proof of presence necessarily carries an inference solely of either possession or carrying on the business of a distiller. To meet the test prescribed by *Tot*, whether it is termed a rational connection or one of reasonableness, the reasonable probabilities of presence for other unlawful conduct must necessarily be excluded. One might say that these respondents were at this location for either one of eleven illegal purposes. That being true, Justice Holmes' comment in *McFarland* v. *American Sugar Refining Company*, 241 US 79, that "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime" indeed has much meaning.

The petitioner in its brief seems to say that just because respondents were at the site, they should be deemed to be

presumptively guilty of something because there are so many crimes related to the business of moonshining. Such is not our understanding of the law. We are not here concerned with any of the other offenses under the Internal Revenue Laws relating to illicit whiskey inasmuch as respondents were indicted, tried and convicted (so far as we are here concerned) on only two of those statutes, namely, possession of the still and carrying on the business of a distiller without bond as required by law.

The possession we are talking about with respect to the first presumption is a highly technical legal concept of dominion and control, *McFarland* v. *United States*, 5 Cir., 273 F2d 417. It is, indeed, far different from the possession that we have in mind when we are concerned with, for instance, possession of recently stolen property or possession of marijuana. That type possession denotes an actual physical possession, the mere proof of which can reasonably lead to the inference that it is a guilty possession. As was pointed out in the court below there is a rational connection between the possession of recently stolen property and the theft of the property. *Yielding* v. *United States*, 5 Cir., 173 F2d 46. Even such, however, requires the additional proof of theft before the presumption comes into effect.

We state briefly and unequivocally that a very marked distinction exists between mere presence at the site of an illicit still and the physical possession of marijuana, the possession of which is unlawful. The presumption relating to such has been sustained by this Court as it is readily seen, that once the *possession*, in fact, has been proven, it is reasonable to infer that such is a guilty possession by virtue of the nature of the article possessed and the statutory prohibition against such possession. Possession of such is not consistent with innocence. However, mere presence with-

out more, at the scene of an illicit distillery is in and of itself consistent with the hypothesis of innocence. It can be a guilty presence or an innocent presence. Therefore, it is not reasonable to draw an inference of unlawful possession from such presence to the degree sufficient to sustain a conviction of the technical aspects of having possession, custody or control of a still or distilling apparatus.

It was decided in *Bozza* that the elements necessary to prove possession were different from those necessary to show one carrying on the business of a distiller. Therefore, if the elements are different, how can the proof of mere presence on the one hand give rise to the inference of guilty possession and at the same time give rise to the inference of an unlawful carrying on of the distilling business? The step must be logical. If the step can lead in two different directions, it seems illogical. We submit that the attempt of Congress to overrule *Bozza* is lacking in rationality and reasonableness.

The petitioner in its brief seemingly attempts to justify these statutory presumptions on the ground that in the exceptional cases justice can be done. We do not agree that a percentage rule insofar as due process to an accused is concerned is proper. It is no justification that "out of every hundred persons ever 'present' when an illicit still is being operated, no more than one would be a stranger to the enterprise". (Pet. brief, page 28.) In determining the validity of these two presumptions we must concern ourselves with that "on ·" whether he be a stranger to the enterprise or not.

It is interesting to note from the recent Fifth Circuit case of *Brown* v. *United States*, 317 F2d 521 (1963) that the court more or less assumed that its prior holdings in "presence" cases such as *Fowler* v. *United States*, 234 F2d 697, and *Vick* v. *United States*, 216 F2d 228, had been overruled

by Sec. 5601(b). However, no attack on the constitutionality of the presumptions was there made. It is suggested that such "presence" cases still have precedent effect to the extent of showing the judicial view that presence alone leaves a lot to be proven either as to possession or carrying on the business whether the statutory presumption exists or not. Such is especially true where there is an absence of circumstantial evidence that would tend to show guilt of the particular offense charged. Mere presence does not provide the springboard from which a reasonable inference of either guilty possession or guilty conduct of the business can be drawn.

We suggest that no citations of authority are necessary for the proposition that if an inference can be drawn from a given situation equally as consistent with innocence as with guilt, it cannot be said that reasonable men would in all likelihood, based upon human experience, necessarily draw the inference consistent with guilt as opposed to that consistent with innocence. However, whether or not it is unlikely that an innocent person would simply happen to stumble upon such a still, presence, without more, does nothing to remove the substantial possibility that the defendant is at the still site for the purpose of engaging in illegal activities other than possession or to carry on the business. Presence appears to be just as relevant in proving any of the enumerated offenses as it is for the two dealt with here.

While convenience to the prosecution may have caused Congress to create the inference, convictions could be accomplished in ways other than in shifting the burden of explanation to the defendant. For instance, it is not necessary for revenue agents to make their arrest as soon as a person reaches a still site. In this connection, petitioner treats the presumption here involved as being of a rebuttable permissive type. While that may be true, never-

theless, the practical effect upon a defendant being confronted with a charge on these presumptions must be considered. One can imagine the effect on the jury in a case such as this when they are charged that while they may consider all the facts and circumstances in reaching their verdict, nevertheless, if they find that the defendants were *present* at the site of the illicit distillery, such as a matter of law, will be sufficient evidence to convict them of possessing the still and carrying on the business of a distiller.

Much has been said by petitioner of the nature and manner of the business of producing illicit whiskey. While it may be true as has been pointed out that such, at least in this area, is done primarily in the rural and secluded spots, the presumptions here dealt with go a long way in presumptively determining an accused guilty for "being there".

We respectfully submit in summary that much has been learned from *Yee Hem* v. *United States*, 268 U. S. 178, and *Tot, supra*. As the Ninth Circuit pointed out in *Erwing* v. *United States*, 323 F2d 674, at page 682:

> "From the teachings of Yee Hem and Tot, supra, we learn: that the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress to make the proof of one fact or group of facts evidence of the existence of the ultimate fact upon which guilt is predicated; that a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience; that where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedures of courts; and

that the comparative convenience of producing evidence of the ultimate fact is but a corollary to the requirement that there be a rational connection between the facts proved and the facts presumed."

The solution to the prosecution dilemma lies, not in this Court taking a critical look at *Bozza* or in upholding these presumptions at the risk of doing violence to the due process requirements. Instead, a slight restraint, self imposed, on law enforcement officers when they have their victims in sight would do much towards obtaining not only direct evidence of participation in criminal activity but also circumstantial evidence that would speak convincingly of guilt absent any presumption.

Too many possibilities exist by virtue of mere presence —legal and illegal—to justify the presumption of guilt simply therefrom.

Conclusion

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals reversing respondent's convictions on Counts 1 and 2 should be affirmed.

JOSEPH H. DAVIS
J. SEWELL ELLIOTT
Counsel for Respondents

September 11, 1964